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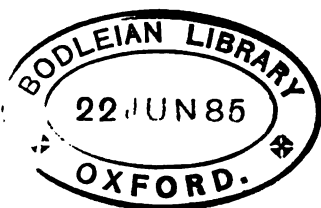
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BEING SPECIALLY INTENDED
FOR THE USE OF CANDIDATES
AT THE
FINAL AND HONORS EXAMINATIONS
OF THE LAW SOCIETY.

BY
ALBERT GIBSON,
SOLICITOR, HONORS, EASTER TERM, 1874,
AND
ROBERT MCLEAN,
SOLICITOR, HONORS, TRINITY SITTINGS, 1881,
Joint Authors of "Observations on the Conveyancing Acts, 1881 and 1882,"
and of "The Student's Practice of the Courts."

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PREFACE.



IN the following pages we have endeavoured to supply a want which we feel exists among Law Students for a book dealing with the subject of the Law of Real Property in so far as it bears upon practical Conveyancing. There are, we admit, existing many books from which the Student can obtain the information he requires, but most of these are treatises which are written more particularly for practising lawyers, and which are increased in bulk and cost by precedents and forms (which in our experience the average Law Student seldom or never reads); while other books either devote a preponderating portion of their pages to the law on its theoretical side or historical side, or else aim at describing the functions which will attach to the embryo solicitor as matters of office routine. We have endeavoured to steer a mid-course between these; and while we have not given any forms or precedents of Conveyancing instruments, and have presupposed an acquaintance by the reader with the theory and history of the law, we have tried to miss no point of law which may arise in connection with any ordinary transaction

in Conveyancing. Hoping thereby the better to command the attention of the Student and to attract his interest more powerfully to a dry and difficult subject, we have couched our language in the form of a familiar address to him.

With a view to making the book as inexpensive as possible, we have avoided giving in footnotes references to the cases cited, and instead have given a complete Table of Cases, with references to the various Reports, to which the reader can turn should he wish to refer to the report of any particular case. With regard to quite recent cases which have not been reported, we have occasionally given references to the "Law Notes" as being the most likely paper to be in the hands of those for whom these pages are most particularly intended, namely, candidates for the Intermediate and Final Examinations of the Law Society.

We are indebted to Mr. ARTHUR WELDON, Solicitor, for perusing the manuscript and proof sheets of the book, and for offering many useful suggestions.

ALBERT GIBSON.

ROBERT McLEAN.

May, 1885.

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TABLE OF ADDENDA, CORRIGENDA ET ERRATA.

- Page 10, 8th line, *after* "escheat," *add* "(33 & 34 Vict. c. 23)."
- Page 28, 26th line, page 31, 26th line, and page 122, 3rd line from bottom, *for* "vendor," *read* "purchaser."
- Page 29, 10th line, *for* "his," *read* "the reversionary."
- Page 31, 4th line from bottom, *strike out* "not."
- Page 36, last line, *for* "purchaser," *read* "vendor."
- Page 76, 24th line, *for* "1860," *read* "1868," and on 33rd line, *for* "1848," *read* "1845."
- Page 81, 6th line, *for* "40," *read* "46," and on 15th line, *for* "D'Aubignan v. Andrews," *read* "Re Angibau, Andrews v. Andrews."
- Page 94, 14th line, *instead of* "and from requiring," *read* "and the section prevents you requiring."
- Page 115, 7th line from bottom, *for* "1881," *read* "1882."
- Page 132, 6th line from bottom, *for* "of" (last word in line), *read* "before."
- Page 134, 20th line, *for* "effected," *read* "affected."
- Page 140, *add* at bottom of page, "(2) The parties to whom the conveyance is made."
- Page 154, 3rd line, *for* "or," *read* "of."
- Page 167, *add* between the 5th and 6th lines, "(3) or the nominees of either in writing."
- Page 189, 25th line, *for* "grantor," *read* "grantee."
- Page 201, 19th line, *strike out* "second or third."
- Page 214, 18th line, *for* "mortgagee," *read* "mortgagor."
- Page 228, 9th line, *for* "mortgagor," *read* "mortgagee."
- Page 240, 16th line, *for* "p. 125," *read* "p. 185."
- Page 256, 18th line, *for* "affidavit," *read* "bill of sale."
- Page 274, 4th line, *insert* "not," before "to."
- Page 282, 24th line, *strike out* "not."
- Page 309, 11th line, *strike out* "at the end."
- Page 312, 20th line, after "whole," *insert* "or in part."
- Page 317, 12th line, *instead of* "11 Geo. 4, c. 19," *read* "11 Geo. 2, c. 19."
- Page 334, 8th line from bottom, *for* "D'Aubigan," *read* "D'Angibau."
- Page 425, 23rd line, *for* "1884," *read* "1882."
- Page 437, 16th line, *for* "child," *read* "children."
- Page 446, *read* example at bottom of page as to "and" being read as "or" conversely.
- Page 485, 9th line, *insert* "one copy" before the word "retained."
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THE INTERMEDIATE AND FINAL EXAMINATIONS OF
THE LAW SOCIETY.

Particulars respecting Mr. ALBERT GIBSON'S Class and Postal Preparation for these Examinations will be found on the back of the Title-page hereof.

INTRODUCTORY CHAPTER.

Of all the departments into which the business of a solicitor is divisible, none demands a greater amount of that kind of knowledge which is to be derived from the study of books than that which is concerned with Conveyancing and the Law of Real Property. You may by the mere exercise of your powers of reason and judgment, in fact by your common sense, together with a consideration of the statutes bearing on the subject, be able to grasp the principles of what is called Common Law, of Equity, of Criminal, and indeed of any other branch of law; but the Law of Real Property is so intimately connected with the history of our social condition, with its rise in the Feudal System established in the eleventh century, and the gradual decay of that system since that time, that it is impossible to understand the why and the wherefore of that law without a study of history. And, even though the practice of Conveyancing is at the present day to a great extent freed by various statutory enactments from the trammels imposed upon it by Feudalism, the very changes effected by the Legislature cannot be properly understood without a knowledge of the law as it stood before such changes were made. Moreover, it must be remembered that the office of the Conveyancer is two-fold. Its main concern is with the transfer of property (which for practical purposes is synonymous with landed property) from one person to another; but incidental to that transfer is the important necessity of the investigation of titles, and the ascertaining whether the person who proposes to make a transfer has a legal power to give a good title to the transferee. And in thus investigating a title you will be for a long time yet to come carried over the boundary line which divides the old system of Conveyancing from the new; and in order to bring a competent share of knowledge to your enquiry, it will be absolutely necessary for you to have a clear notion of the nature of the tenure of land and of the methods by which it was transferred in olden times.

There are, of course, many points of the old law which are practically obsolete; there are others, which, though still possessing vitality, will not present themselves to you in the course of an ordinary piece of business, which comes within the sphere of your duties as a Conveyancer. But there are also many of these old

points which will have to be borne in mind by you in the most simple and ordinary cases ; while some others will only crop up in transactions of a more complicated nature than usual. A recent writer on the Law of Real Property says, "In spite of the numerous simplifications which have been effected during the last half century, the bulk of the law peculiar to Real Property is still large ; and it contains not a few intricate and abstruse technicalities, which are undoubted law, and which would certainly be recognised as such by the Courts. Of these technicalities some, being little used in common practice, only emerge at rare intervals, and under extraordinary circumstances, from their normal obscurity. But others are of more frequent occurrence, and some are in constant use. Nor can the practice of Conveyancing be exercised with prudence and safety, or the recent Acts be completely understood without a theoretical knowledge of the whole." (Challis on "The Law of Real Property," p. 1.)

It would be but a waste of words to add anything more as to the necessity of being thoroughly acquainted with the theory of the Law of Real Property before you can consider yourself qualified to handle it practically as a Conveyancer. In the following pages we shall assume that you are not entirely unacquainted with the law in theory, but that you have grounded yourself in at least its more important principles. It will be our endeavour to draw your attention to some of the more salient points of the law which it will be necessary for you to have clearly before your mind's eye when engaged in the conduct of any matter in connection with practical Conveyancing, whether it be the superintending of an ordinary sale and purchase, of a loan upon mortgage of realty or personalty, or the preparation of a lease, a settlement, or a will. And though, strictly speaking, the drafting of Partnership Articles does not come within the scope of the office of a property lawyer, yet, as it will form a large part of your business as a Conveyancer, to this, as well as to deeds of release, disclaimer, and appointments under powers, we shall devote a few words ; and in our concluding Part we shall treat of the remuneration to which, as a solicitor, you will be entitled to for Conveyancing business.

It will be convenient, then, to imagine you as actually concerned in the transacting of some part of a Conveyancer's business, and to address you as a tutor would his pupil, pointing out to you the various points of law which you must bear in mind upon each particular occasion.

The Student's Conveyancing.

PART I.—VENDORS AND PURCHASERS.

CHAPTER I.

LEGAL DISABILITIES.

WHEN you are concerned in the sale of any landed property, whether you are acting for the vendor or the purchaser, the first point of law which will demand your attention will be the legal capacity of the vendor to sell and of the purchaser to purchase. For if a disability exists in either case, it will be useless to proceed any further in the business of the sale.

The disabilities which we shall have to consider may be either such as are imposed by law, or they may be such as arise from the nature of the interest which your client has in the property he proposes to sell or to purchase. We will consider these disabilities under the following heads :—

- I. Persons non compos mentis.
- II. Infants.
- III. Married women.
- IV. Aliens.
- V. Traitors and felons.
- VI. Corporations.
- VII. Persons acting in a fiduciary character.
- VIII. Promoters, &c. acting under the Lands Clauses Consolidation Act.
- IX. Limited owners, *e. g.* tenants for life, &c.

I. *Personæ non compos mentis*

Under this title we include idiots, imbeciles, &c. persons with regard to whose sanity an inquisition has been held, and who on such inquisition have been found to be insane, and persons of unsound mind not so found.

Generally speaking, a person of unsound mind cannot make a binding conveyance of land. This is certainly the case when the purchaser knows of his insanity. Where the purchaser is ignorant of it and acts in good faith, the case seems more doubtful. In *Molton v. Camroux*, with regard to an executed contract, such as a sale would be, it was laid down that a sale under such circumstances, if the parties could not be restored to their original positions, was binding on the person of unsound mind. And in *Beaton v. MacDonnell*, this doctrine was supported. A feoffment by such a person was said to be not void but voidable only; for the livery of seisin which accompanied it made it a very strong kind of assurance, and operated to pass the estate "by wrong," so that such a feoffment might be afterwards confirmed. But though voidable, it was not voidable by the feoffor himself, for it was held that he could not be heard "to stultify himself," i.e. to plead his own unsoundness of mind. It could be, however, avoided by his heir after his death. But now, by 8 & 9 Vict. c. 106, s. 4, no feoffment can have a tortious operation, so that it would seem a person non compos mentis cannot convey even by feoffment, and it is obviously unsafe, to say the least of it, to take a conveyance from such a person. Persons of unsound mind are competent to purchase land, but their purchases are not of much value to the vendor, for the person non compos mentis cannot be compelled to retain the land if the bargain is in the least disadvantageous to him. It is questionable if he can avoid the purchase himself, but on his death his heir has the option of waiving or accepting the estate. Though a person of unsound mind cannot dispose of his property himself, there are various statutes which enable his committee, when he has been found a lunatic by inquisition, to do so for him. Thus, under the Lunacy Regulation Act, 1853, his property may be sold, mortgaged, leased or otherwise disposed of, by order of the Lord Chancellor, or of the judges having jurisdiction in lunacy, for payment of debts,

for maintenance, &c., or to carry on his business or trade. And the committee may, by a like order, sell, mortgage, let, divide, exchange or otherwise dispose of his land in performance of contracts entered into prior to the lunacy, convey partnership property on a dissolution, sell undivided shares of land, or make partitions or exchanges, sell lands for building purposes, dispose of business premises, &c. Again, committees can convey in certain cases; thus they can make conveyances under the Elementary Education Act, 1870, s. 21; also, when their property is taken under the Lands Clauses Consolidation Act, 1845, s. 7; and, further, they can exercise in the lunatic's behalf the powers given to sane persons under similar circumstances by the Settled Land Act, 1882. These powers we shall have occasion to examine later on.

II. Infants.

(a.) *As to Sales by Infants.*

At common law the conveyance of an infant—*i.e.* of a person who has not attained the age of twenty-one years—is voidable, *i.e.*, when he comes of age he can avoid it, or, if he dies a minor, his heir may avoid it. And even a feoffment by an infant is voidable. There is an exception to this, however, in the case of gavelkind lands, for these may be alienated by a minor at fifteen years of age by a feoffment. In case of the conveyance by an infant, it was the practice to give the purchaser a bond that the infant should convey when of age. Various statutes have made provision for the transfer of the lands of infants in certain circumstances. Thus, under the Lands Clauses Consolidation Act, 1845, when their lands are compulsorily required, their guardians can convey (sect. 7). A more remarkable change, however, is effected by sect. 41 of the Conveyancing Act, 1881, which provides, that when an infant is seised in fee of land, or for any leasehold interest at a rent, such land shall be deemed a settled estate within the Settled Estates Act, 1877. The result is, that under sect. 16 of the latter act the court can authorize a sale of the land, and under sect. 22 direct what person shall execute the deed of conveyance. A still more revolutionary change is wrought by sect. 59 of the Settled Land Act, 1882, which provides that when an infant is seised of or entitled in possession in his own right to land, he shall be deemed

a tenant for life thereof within that act. The act empowers a tenant for life to sell settled land (sect. 8) under certain conditions, and, if he be an infant, enables the trustees of the settlement, or, if there are none, then some one appointed by the court, to exercise all the powers the tenant for life could exercise were he of full age. But of this act, and also of the making of marriage settlements by infants under 18 & 19 Vict. c. 43, we shall speak later on.

An infant cannot exercise a power of appointment over real property (see *Hearl v. Greenbank*); but when arrived at years of discretion he can, by deed (but not by will, owing to 1 Vict. c. 26), exercise a power of appointment over personal property, whether the power is a power collateral, or a power appendant, or a power in gross. (See *In re D'Angibau, Andrews v. Andrews*.)

(b.) *Conveyances to Infants.*

An infant may purchase land, as it may be for his benefit; but the conveyance to him is void if he dissents from it on attaining full age, or, if he dies under age without having dissented, his heir may nevertheless avoid it. Incidentally we may remark that an infant cannot enforce specific performance of a contract for purchase of land, for the remedy is not mutual, as it could not be enforced against him (*Flight v. Bolland*). And if, after contracting to purchase and paying a deposit, he refuses to complete on attaining majority, he cannot recover the deposit, except where it was obtained from him by fraud. Practically, then, if your client makes a purchase from an infant, he should have recourse to the Settled Land Act, and apply to the court to appoint some one to convey, and you should warn him that it is not advisable to sell to an infant.

It seems doubtful whether the Infants Relief Act, 1874, which makes ratification on majority of contracts entered into during infancy valueless, applies to contracts relating to the sale and purchase of lands, and whether, consequently, such contracts can still be ratified on majority. The eminent authors of *Prideaux's Conveyancing*, *Dart's Vendors and Purchasers*, and *Chitty's Contracts*, and the decision in *Martin v. Gale*, seem to support the opinion that they are voidable only. On the other hand, the learned editor of *Stephen's Commentaries* (9th ed.) considers that the Act of 1874 does affect these contracts, and consequently, that while

purchases and sales of lands by infants are voidable, their contracts relating to lands are void.

III. Married Women.

(a) *As to Sales to a Married Woman.*

A vendor is now under no restrictions in selling to a married woman, for since the Married Women's Property Act, 1882, she may acquire property like a *feme sole*. The old law was that she was not absolutely incapacitated from purchasing land, but her husband during her life, and her representatives after her death, might avoid the purchase if not made out of her separate estate. But the vendor should be careful to ascertain that she has power to enter into the contract for sale, and that she has separate property which may be bound. Since the Act of 1882, she may enter into any contract, and will be liable thereon in respect of and to the extent of her separate property, and that estate will be bound by the contract (even if acquired subsequently to the date of the contract). This is so, whatever the date of her marriage may be.

(b) *As to Sales by a Married Woman.*

At common law a married woman could not dispose of her lands, except with her husband's concurrence, nor otherwise than by fine or recovery, after a private examination to ascertain that her act was voluntary. The statute 3 & 4 Will. 4, c. 74, substituted, as you know, an ordinary deed for a fine, &c., but still required the husband's concurrence and a due acknowledgment of the deed under the act. This act (as modified by sect. 7 of the Conveyancing Act, 1882, in respect to the manner of taking the acknowledgment) still applies to property which is not hers as her separate estate, or which does not come within the Married Women's Property Act, 1882. Under this act her unfettered power to dispose of her property will depend on the date of her marriage. If this was prior to the 1st January, 1883, she may convey like a *feme sole* all property to which her title whether vested or contingent, and whether in possession, reversion or remainder, accrues after the 31st December, 1882. If subsequent to the 31st December, 1882, she may also convey like a *feme sole*, for all property which belongs to her *at the time of marriage*, or is acquired by or devolves on her after marriage, belongs to her for her separate use.

Acting then for a purchaser from a married woman, you should first ascertain the date of her marriage. If this was subsequent to 31st December, 1882, you will know that she may convey without restriction, and that her husband need not be joined. If she was married before the 1st January, 1883, you must inquire if the property she proposes to sell accrued to her before or after the 31st December, 1882. If it accrued after that date, then she can sell like a *feme sole*; if it accrued before that date, then there are several further questions you will have to put. The first should be, was the property limited to her in terms to her separate use? If this is so she can again convey like a *feme sole* (see *Taylor v. Meade*), unless she is restrained from anticipation, in which case she will have no power to dispose of the property. But in connection with this, note that the restriction against alienation only attaches during coverture, and if her husband is dead she may then dispose of the estate (*Tillot v. Armstrong*); and that though the Conveyancing Act, 1881, authorizes the court to remove the restriction, yet the court will not do so except where it is for her benefit. See hereon *Tampin v. Miller*, where V.-C. Hall said he should require very strong reasons to be furnished before he would make an order for its removal; and *Hodges v. Hodges*, where it was considered that the act justified a removal of the restraint for the purpose of paying a wife's debts, she being harassed by creditors. (See also *Ex parte Thompson* and *In re Wood*.) If you find that the property has not expressly been given to her for her separate use, you must then inquire if other circumstances exist which give her power to convey as a *feme sole*. There are several cases in which she can do so. Thus, if she has a power of appointment over the property, she can exercise it without her husband's concurrence. She may also convey as a *feme sole* when she is a bare trustee. (37 & 38 Vict. c. 78, s. 6.) Again, if she has obtained a judicial separation, or a protection order under the Divorce Act, 1857, or under the Matrimonial Causes Act, 1878, she may dispose as a *feme sole* of any property which may devolve on, or be acquired by, her during the separation, and even if she cohabits with her husband again, all property which she may be entitled to when such cohabitation takes place will be hers for her separate use, unless she and her husband have whilst still separate made some agreement in writing to the contrary. Supposing, however, that you find that no circumstances exist

which enable her to deal with her property as a *feme sole*, then her husband must be required to join in the conveyance, and the deed will have to be acknowledged under the Fines and Recoveries Act, as altered by sect. 7 of the Conveyancing Act, 1882. The court has power under sect. 91 of 3 & 4 Will. 4, c. 74, to dispense with the husband's concurrence, and this was done in the case of *Ex parte Caine*, where the husband was living apart from the wife, and refused to join in unless he first received 50*l*.

The acknowledgment is now taken by one instead of two commissioners, and no registration of the deed is required, but a declaration indorsed upon the deed, and duly signed by the commissioner, showing that the acknowledgment was properly taken, is all that is required to complete the title of the purchaser. (See sect. 7 of the Conveyancing Act, 1882, and Rules drawn up thereunder.)

The above remarks apply more especially to the wife's freehold lands. Copyholds and leaseholds come within the Act of 1882 under the same circumstances as freeholds do. As to copyholds not within the act, and not otherwise belonging to the wife for her separate use, the husband and wife can convey her legal or equitable interest by a surrender by both, taken after a separate examination of the wife by the steward, and her equitable interest therein can be conveyed by an ordinary deed acknowledged, as in the case of freeholds. As to the wife's chattels real, she cannot dispose of them during her husband's life, unless they fall within the Act of 1882, or otherwise are hers for her separate use; for they vest in the husband, and he can dispose of them in any way except by will. If, however, the interest of the wife is reversionary, then the lease can only be disposed of by the husband alone, if the reversion may possibly fall into possession during coverture. If the reversionary interest is of such a character that it cannot possibly fall into possession during coverture, a deed acknowledged under 3 & 4 Will. 4, c. 74, as read with sect. 7 of 45 & 46 Vict. c. 39 (the Conveyancing Act, 1882), would be necessary.

A deed acknowledged is thus still necessary to convey the lands of married women in the following cases:—

- (1) To convey freehold lands acquired by a married woman before 1st January, 1883, and not settled to her separate use.
- (2) To surrender copyholds so acquired.

- (3) To assign reversionary interests in leasehold property so acquired if there is no chance of the reversion falling in during coverture.

A deed acknowledged would also appear to be still necessary when a married woman is a trustee of lands, no matter when married nor when her title to the lands accrued; for no express provision is made in the Married Women's Property Act of 1882, to enable her to dispose of such lands as a *feme sole*, since sect. 18 of that act, which deals with married women who are trustees, merely enables them to dispose of stocks and shares as if they were single. Such a deed would still also be necessary for a disclaimer of lands, the Act of 1882 not speaking of a disclaimer, and 8 & 9 Vict. c. 106, requiring disclaimer by a married woman of lands to be by deed acknowledged.

We should note briefly that statutes which empower persons under disability to alienate their property, generally include married women, *e. g.*, the Lands Clauses Consolidation Act, 1845, s. 7.

It is not necessary to take into consideration the husband's curtesy as an obstruction to a married woman's conveying, for her conveyance will defeat his right to it. Incidentally, however, we may remark that curtesy attaches to the wife's separate property (*Cooper v. Macdonald*), and probably, also, to property within the Act of 1882.

IV. Aliens.

Your client now will be perfectly safe in conveying to or taking a conveyance from an alien. For, by the Naturalization Act, 1870, real and personal property of every description may be taken, held, acquired and disposed of in the same manner as by a natural-born British subject, and a title to such property may be derived through, from, or in succession to an alien, just as through, &c. a natural-born British subject. But sect. 14 provides that nothing in the act shall qualify him to be owner of a British ship or of any share therein. This act is not retrospective (*Sharp v. St. Sauveur*), so that in case the title deeds show that the alien acquired the land before 1870, it will still be necessary in purchasing from him to bear in mind the old law on the subject, which was as follows:—At common law he could only hold land by a lease for years for

the purposes of residence or the convenience of merchandise. With this exception, when land was conveyed to him it was forfeited to the crown on office found or on his death, whichever first happened, and this even if the alien, in the meantime, conveyed it away. An alien artificer could not even take a lease of a shop or house. Thus the law continued till 1844, when it was enacted by 7 & 8 Vict. c. 66, that every person born out of her Majesty's dominions, of a mother being a natural-born subject of the United Kingdom, might take to himself, his heirs, executors, administrators, any estate real or personal by devise, purchase, inheritance or succession (sect. 3). Sect. 4 allowed all aliens to take and deal with pure personal property, and sect. 5 to take a lease of land or a house for twenty-one years for residence or business purposes. The Act of 1870 has, as we have seen, put aliens much in the same position as natural-born subjects as to taking, holding, &c. without the necessity of obtaining a certificate of naturalization or taking any other steps, except for the purpose of holding shares in ships. There are two or three points in connection with tracing title through aliens which are deserving of your attention. For instance, an alien may be naturalized by act of parliament, or since 7 & 8 Vict. c. 66, by certificate of the Secretary of State, or he may be made a denizen by letters patent, and in these cases he becomes capable of holding real property purchased after that time. Again, aliens could not at common law transmit land by descent, and the son of a denizen who purchased land could not inherit that land if he was born before the denization. But if in such a case naturalization were substituted for denization, the son would inherit, for naturalization had a retrospective force.

V. Traitors and Felons.

It is not necessary to go further into the old law on the subject than to remind you that before July, 1870, if a man was attainted of treason, he forfeited his land to the crown for ever, and if he was attainted of felony, *i. e.*, sentenced to death or judged outlaw on a capital offence, his land was forfeited to the crown for a year and a day, and then escheated to his feudal lord; and further, that though the forfeiture only arose on attainder, it related back to the time of the offence, so that all intermediate dealings by the attainted with such property were void. So that a purchaser from

a man who had committed such a crime would, when the man was attainted, lose his purchase, and this even if he was without notice. Traitors and felons could, however, alien their chattels real and personal provided they did so before conviction. The law on the point is, since the 4th of July, 1870, put on a new footing, and no confession, verdict, inquest, conviction or judgment of or for any treason or felony will now cause any attainder or corruption of blood or any forfeiture or escheat. The act did not affect the forfeiture consequent on outlawry (sect. 1), but outlawry now in civil actions is abolished by 42 & 43 Vict. c. 59. The convict cannot alien during the period of his sentence, and provision is made for the appointment of an administrator of the property of traitors and felons, in whom all the property the convict had at the time of conviction, or which he afterwards acquires, vests, and who has absolute power to let, sell, mortgage, convey and transfer any part of such property as he thinks fit. An interim curator may be appointed, to act where an administrator has not been appointed.

It follows, then, if your client purchases from a convict that he should take the conveyance from the administrator, who should be a party to acknowledge the receipt of the purchase-money, and if he sells to a convict that the administrator should join in the deed to convey the property.

Although a convicted felon cannot convey his lands himself, yet his lands may be taken compulsory from him for the purpose of paying his debts. Thus, he is capable of paying a debt claimed by a debtor's summons served after his conviction, and if he does not pay he commits an act of bankruptcy. (*Ex parte Graves, Re Harris.*)

VI. Corporations.

With a few exceptions corporations cannot *hold* land without a licence from the Crown, but they may take or convey by feoffment, and also apparently by deed of grant under 8 & 9 Vict. c. 106. You may, therefore, safely convey to a corporation, for they are as capable of purchasing lands as an individual. Formerly, the licence of the lord from whom the purchaser held his fee simple estate was necessary, as he lost his chance of escheat, but since 7 & 8 Will. 3, c. 37, this is not necessary. Incorporated charities may, under certain circumstances, with the consent of the

charity commissioners, hold land without a licence under 18 & 19 Vict. c. 124; and so may corporations formed for public or charitable purposes under 33 & 34 Vict. c. 34; and 35 & 36 Vict. c. 24, enables trustees of certain charities to be incorporated, and yet hold and convey lands in the same manner as trustees might do without such incorporation. Again, joint stock companies, registered under the Companies Act, 1862, may hold lands, subject to this, that no company whose objects do not involve the acquisition of gain can, without the sanction of the Board of Trade, hold more than two acres of land.

We give you some other instances in which corporations can deal with lands. By the custom of London churchwardens are a corporation to purchase land; and churchwardens generally can by statute purchase lands for specified purposes, *e.g.*, for poor law and educational purposes. Municipal corporations may, under 45 & 46 Vict. c. 50, purchase and hold land to the extent of five acres for buildings for borough purposes, and the Treasury may authorize them to acquire further land. These corporations cannot sell their land except with the approval of the Treasury; they may, however, make leases for not exceeding thirty-one years without such approval. These are special cases in which you will have to acquaint yourself with the particular powers and constitution of the corporation, and the special statutes which regulate their ability to buy or sell land. But there is a case in which you will find it necessary to have a knowledge of the general law bearing on the point, and this is when your client wishes to convey land to some charity.

To be able to explain to him how far he may do this, you will have carefully to study the various Statutes of Mortmain, beginning with 9 Geo. 2, c. 36; we postpone to another part of the work the question of how far he can benefit a charity by a devise of land in his will.

Your client may wish—(a) to make a free gift of land to the charity, or (b) to sell land to it for valuable consideration. Now there are some cases in which he can either make a gift of land or sell it to the charity without observing the formalities of 9 Geo. 2, c. 36. The following institutions are excepted from that statute—

- (1) The Universities of Oxford or Cambridge or any of their colleges; or the colleges of Eton, Winchester or Westminster.

- (2) The Foundling Hospital, 17 Geo. 2, c. 29.
- (3) The British Museum, 26 Geo. 2, c. 22; 5 Geo. 4, c. 39.
- (4) The Marine Society, 12 Geo. 3, c. 67.
- (5) The Bath Infirmary, 19 Geo. 3, c. 23.
- (6) Queen Anne's Bounty, 43 Geo. 3, c. 107.
- (7) Greenwich Hospital, 10 Geo. 4, c. 25.
- (8) The Royal Naval Asylum, 51 Geo. 3, c. 105.
- (9) Seamen's Hospital Society, 3 & 4 Will. 4, c. 9.
- (10) St. George's Hospital, 4 Will. 4, c. 38.

(a) In any other cases than the above a *free gift of land* to a charity must conform to the requirements of 9 Geo. 2, c. 36, as modified by 24 Vict. c. 9, and 27 Vict. c. 13, s. 1. These requirements are as follows:—

- (1) The conveyance must be by deed.
- (2) The deed must be executed twelve months before the donor's death.
- (3) Two witnesses must attest the deed.
- (4) It must be enrolled within six months of execution in the Chancery Division of the High Court.
- (5) It must take effect in possession immediately.
- (6) It must be without any power of revocation or reservation for the benefit of the donor.

With regard to head (4), 27 Vict. c. 13 provides that, when the deed has been lost and so cannot be enrolled, the Court of Chancery may order any subsequent deeds which disclose the charitable trusts to be enrolled.

And with regard to head (6), 24 Vict. c. 9 allows the reservation of a nominal rent, of minerals, easements, of covenants as to buildings, streets or nuisances, or similar provisions for the enjoyment as well of the premises conveyed as of adjacent premises, or any right of entry on non-payment of rent, or breach of covenant, or similar stipulations for the donor's benefit. With these modifications, 9 Geo. 2, c. 36, must be complied with. A gift, however, of land for a public park, schoolhouse, elementary school, or public museum, is not now within that statute; but by 34 Vict. c. 13, it is good if made twelve months before the donor's death, and the

deed of gift is enrolled with the Charity Commissioners within six calendar months after coming into operation.

(b) Secondly, sales to charities for valuable consideration. If these were made *bond fide* and for full and valuable consideration paid on or before making the conveyance, without fraud or collusion, 9 Geo. 2, c. 36, does not require the deed to be executed twelve months before the vendor's death, but all the other formalities were to be observed. Later statutes have considerably extended the meaning of the words "valuable consideration." By 24 Vict. c. 9, it may consist wholly or in part of a rent-charge or other annual payment; and by 27 Vict. c. 13, of a rent. Provision is made by 29 & 30 Vict. c. 17, for remedying the inadvertent omission to enrol within due time in cases in which the charity is in possession under the sale.

Besides the cases enumerated above, there are other cases in which a sale for value may be made to a charity without observing any unusual formalities. Thus, by 31 & 32 Vict. c. 44, two acres of land may be sold to the trustees of any religious, literary or scientific society, for erecting a building for their purposes; and by 34 Vict. c. 13, land may be sold for the purposes of a public park, schoolhouse, elementary school or public museum, and in none of these cases need the formalities of the Mortmain Acts be observed.

VII. Persons acting in a fiduciary capacity.

If your client is purchasing from a trustee, you must in the first place ascertain that the trustee has power to sell, and this you can only do by consulting the instrument creating the trust under which the trustee acts; for the statutes relating to trustees' powers of sale only apply in cases where they have selling powers under their trust instruments. The effect of Lord Cranworth's Act, and of the Conveyancing Act, 1881, we shall consider later on.

There is one case in which trustees and executors are empowered to sell land by statute; this is by virtue of sects. 14—17 of 22 & 23 Vict. c. 35. It relates, as you know, to trustees and executors under wills, and confers powers of sale when the testator has charged his lands with the payment of debts or legacies. If he has devised his estate so charged to the trustee for his whole

interest therein, and has made no express provision for raising the debts, &c. out of the estate, the trustee may sell the land ; if he has not vested the land in the trustee for his whole estate and interest, then the executor may sell. And purchasers or mortgagees are not required to inquire whether the powers given by the act have been duly exercised by the person to whom they are given. It has been decided that this act does not apply to administrators with the will annexed. (*Re Clay and Tetley.*) In *Tanqueray-Willaume v. Landau*, it was held that where executors are directed to pay the testator's debts, and there is a gift of all his realty to them beneficially or in trust, the debts are payable out of the estate so given.

Again, in purchasing from a mortgagee, you will have to refer to the mortgage to ascertain the nature of his power of sale ; but you will remember that even if the mortgage gives no power to sell, the mortgagee will have one by virtue of Lord Cranworth's Act, if his mortgage deed is dated between the 28th August, 1860, and the 31st December, 1881, and by virtue of the Conveyancing Act, 1881, if the mortgage was executed after that date. These enactments will be considered in subsequent pages. But, notwithstanding these statutes, the mortgage itself ought, strictly speaking, to be referred to, for though it is not likely to happen, yet it is possible that the powers given by them may be expressly excluded.

It is useful to remember that trustees in selling may now sell the surface of the land apart from the minerals, or *vice versa*, without any special power in that behalf. (25 & 26 Vict. c. 108, which nullifies the decision in *Buckley v. Howell*. This act will also, it has been held, include mortgagees selling under their power of sale. *Re Wilkinson.*)

Since the Settled Land Act, 1882, trustees who are empowered to sell settled lands must obtain the consent of the tenant for life (sect. 56) ; but if there are several persons forming together one complex tenant for life, then the consent of any one of those persons is sufficient (Settled Land Act, 1884). And if this consent is given, the minerals may be sold apart from the land, and *vice versa*, without the necessity of obtaining the court's consent under 25 & 26 Vict. c. 108. If the lands are vested in trustees *upon trust for sale*, then the consent of the tenant for life is not necessary to the sale. (See sect. 63 of the Settled Land Act, 1882, and sect. 6 of the Settled Land Act, 1884 ; and see *Taylor v. Poncia.*)

In ascertaining the powers of the parties to sell, you may in some cases have to take into consideration the relation in which the parties stand to each other. For a fiduciary relationship between them may have an important bearing on the sale. The following examples of this are worthy of your attention:—

- (1) A parent can purchase from his child, but the sale may be impeached unless it is reasonable and the most scrupulous good faith has been observed.
- (2) A guardian cannot purchase from his ward while the relationship of guardian and ward is still subsisting. And even where the ward has come of age it will be dangerous for the ex-guardian to purchase from him, if but a short time has elapsed since the ward attained his majority, for the onus will be laid on the guardian of showing that he has made a fair bargain and has reaped no advantage from the influence his former position with regard to the ward must be presumed to have given him.
- (3) In the same way, a conveyance from one of his flock to a minister of religion is liable to be set aside on the ground of undue influence.
- (4) A client may convey for valuable consideration to his solicitor, but it will lie on the latter to show the propriety of the transaction and that the client had independent advice. And the solicitor must not purchase in the name of a trustee or agent, for no such sale can stand (*Gresly v. Mousley*; *Tomson v. Judge*). A gift (except by will) from a client to solicitor is void.
- (5) A conveyance from a patient to his medical adviser stands in much the same position as a conveyance from a client to his solicitor, though a gift by a patient is not necessarily void, and it will be upheld if it is shown that the patient acted as a free agent, and had separate and independent advice. But such a gift is watched most jealously by the court (see *Wallis v. Routh*).
- (6) An agent selling property of his own to his principal must disclose the fact. And if he purchases his principal's property in the name of some other person, his principal may afterwards, on discovering the fact, repudiate the sale, and claim any profit the agent may have made.

- (7) A trustee for sale is often aggrieved to hear that he cannot safely purchase from himself. Yet such is the law on the subject. The sale is not void *ab initio*, but it is liable to be set aside as a matter of course on the *cestui que trust* applying to the court within a reasonable time. Again, a trustee cannot as a rule purchase any portion of the trust property from the *cestui que trust*. The result of various decisions on the point would seem to show that such a purchase would stand good in the following circumstances ; (a) if the trustee will give more for the trust estate than any other person, in other words, if he will give a fancy price for it ; (b) if the offer to sell proceeds from the *cestui que trust* and the trustee pays the ordinary value in the market, keeping the *cestui que trust*, as it has been styled, at arms' length ; (c) if the sale is by public auction and the trustee has the leave of the court to bid ; (d) in all cases in which the purchaser is a bare trustee only, *i. e.*, a trustee "who has no duties to perform beyond the simple obligation to convey the land to or according to the direction of his *cestui que trust* whenever required to do so, and in the meantime to permit him to receive the rents and profits." (See 2 Pridgeaux, 13th ed. p. 144.)
- (8) A mortgagee with a power of sale stands in the same position as a trustee, and he cannot sell to himself under the power. But he may purchase the property from the mortgagor and take a conveyance from him, for there is only the relation of dry trustee and *cestui que trust* between them.

VIII. Promoters, &c., acting under the Lands Clauses Consolidation Act.

Cases may so often happen in which you are called upon to act for a vendor who has received a notice to treat or for purchasers who are buying under the compulsory powers given by the Lands Clauses Consolidation Act, 1845, that we think it will not be out of place to give you a short summary of that statute. Its chief object is to encourage enterprise by enabling the promoters of any undertaking of a public nature to acquire land from individuals who either will not or who by reason of some disability cannot sell.

It enables all parties entitled to land or to any estate or interest therein to sell the same, and to enter into all necessary agreements with that object. Particularly it enables corporations, tenants in tail or for life, married women seised in their own right or entitled to dower, guardians, committees of lunatics and idiots, trustees of charities, executors and administrators, and generally all parties for the time being entitled to the receipt of the rents and profits of any such land in possession, or subject to any estate in dower, or to any lease for life or for lives and years or for years, or any less interest, to sell their lands, and (with the exception of married women entitled to dower and lessees for life, &c.) to sell them not only on behalf of themselves, but also on behalf of persons entitled in reversion, remainder or expectancy after them, so as to defeat the estates of such parties; and it enables married women and all owners of land who are under disability to deal with the land as if they were respectively under no disability. Though corporations generally are empowered to sell, municipal corporations must still get the consent of the Treasury (s. 15), and committees of lunatics should obtain the permission of the Lord Chancellor. (*Re Wade*.) The proceedings under this act are briefly as follows:—When the promoters require any land they must first give a notice to treat under the act. This notice specifies what lands they desire to take. An owner who is competent to deal with his lands freely can, of course, make any agreement he likes with them. But it is when the owner for the time being is under disability or refuses to treat, that the provisions of the act are more especially of use. In such cases the value of the land is first to be ascertained, either by the verdict of a jury or by arbitration, or by a valuation. The compensation or purchase-money having been determined in one of these ways, is, in the case of disability, to be dealt with in different ways varying with its amount. If it exceed 200*l.*, it must be paid into the bank in the name of the paymaster-general, and it will there remain until applied by the court, in (a) the purchase or redemption of the land sold or other lands settled along with it but not taken; (b) the purchase of other lands to be settled in the same manner as the lands sold; (c) the replacing of buildings if buildings have been compulsorily taken; (d) the payment to any party absolutely entitled to the money;

(e) in some one or more of the ways in which capital money can be invested under the Settled Land Act, 1882 (see sect. 21 of that Act). If the purchase-money is under 200*l.* but over 20*l.* it can either be dealt with in the same way as sums over 200*l.*, or else, if the promoters agree, it may be paid to two trustees for the party under disability, the promoters approving of the trustees selected; in this case the trustees will apply the money in the same way as if it had been paid into the bank, but no order of the court need be obtained by them.

If the purchase-money does not exceed 20*l.* it can be paid to the parties entitled to the rents and profits of the lands, or if these are under disability, to their guardians, husbands, committees, or trustees, as the case may be. The promoters having paid the money in accordance with the act, can require the vendor to convey to them, or as they direct. In default thereof, or if the vendors cannot adduce a good title, the promoters can vest in themselves all the estate and interest of the vendors in the land, and also the interests of those persons on whose behalf the act enables them to sell, by executing a deed poll; and by a similar deed they can vest in themselves the interest of a vendor who refuses to accept the purchase-money when tendered, or who fails or neglects to make out a good title, or refuses to convey, and also of a vendor who is absent from the kingdom, and cannot be found after diligent inquiry. When the conveyance is made to the promoters it will operate to bar all estates tail, and all other estates, rights, titles, remainders, limitations, trusts, and interests whatever in the land. The promoters are to bear the whole costs of the purchase, both their own and the vendor's. The concurrence of encumbrancers who refuse to receive their money or to release, or who cannot make a satisfactory title, can be dispensed with. The promoters can only exercise these compulsory powers for the period named in their special act; if that prescribes no period, then only for three years from the passing of their special act. Provision is also made for the disposal of such land which the promoters have bought and find are not required for the purposes of their undertaking. Within ten years after the time specified in their special act for the completion of the works for which they have bought the lands, they are to sell these superfluous lands. Unless they are situate in a town, or are lands built upon or used for building purposes, they must be first offered to the person entitled to the lands, if

any, from which they were originally severed. If he declines to buy, or does not within six weeks signify his wish to purchase them, or cannot be found, then they are to be offered to other adjoining owners. If they will not buy, the property may be sold to other persons, but if not sold by the expiration of the ten years, then the lands will become the property of the owners of property adjoining thereto, in proportion to the extent of their lands respectively adjoining the same. Such are the leading features of the Lands Clauses Consolidation Act, which for practical purposes you cannot know too well, for under it sales to railway companies and municipal corporations are every day taking place.

You will bear in mind that directly the price which is to be paid to the vendor for lands compulsorily taken from him under the provisions of this statute is fixed, but not before, the property is converted, so that if the vendor died before completion the purchase-money would form part of his personal estate. This conversion would not, however, take place if the lands belonged to a person under disability, or if the lands were settled; and in such cases, as you have seen, the money is paid into the bank, and has to be laid out in certain specified ways already referred to.

In connection with persons whom some disability prevents from conveying, the provisions of the Trustee Act, 1850, should be borne in mind. This act makes provisions for the vesting of estates in the hands of trustees and mortgagees who are under disability. In such cases the estates can be passed by applying to the court and obtaining a vesting order. In the case of a lunatic trustee or mortgagee, the Lord Chancellor can make a vesting order which will vest the estate in such person and for such estate as he shall direct, and will have the effect of a conveyance; and the Lord Chancellor may also make an order releasing the lands of such a trustee or mortgagee from his contingent right therein, and disposing of it to such person as he shall direct. And in the case of infant trustees or mortgagees, similar orders may be made by the Chancery Division. Such an order may also be made by the court when a sole trustee is out of the jurisdiction or cannot be found; and where a joint trustee is out of the jurisdiction or cannot be found, the court may make an order disposing of his contingent right in the land to the persons jointly entitled with him, or to them together with any other persons. Similar orders can be

made when it is uncertain which of several trustees was the survivor, or where it is uncertain whether the last trustee is living or dead. It is well also to remember that under sect. 30 of the Conveyancing Act, 1881, when a sole trustee or mortgagee dies, the person to convey or re-convey is his personal representative, and not his heir nor the devisee of his trust or mortgage estates.

IX. Limited Owners of Land.

Persons not having the whole fee simple in the land, are empowered under various circumstances by statute law to dispose of the whole fee. We shall note these cases more particularly during the course of our subsequent remarks, when we treat of the limited owners to whom the powers are given. It must suffice in this place merely to point out that they may have such powers. Thus we shall find that leaseholders have in certain cases power to convert their tenancy into a fee simple or freehold under the provisions of the Conveyancing Acts, 1881 and 1882; that tenants for life can sell the fee simple estate in their land under the Settled Estates Act, 1877, with the leave of the court; and that, under the Settled Land Act, 1882, tenants for life (which term includes tenants in tail, tenants in fee with an executory limitation over, persons entitled to base fees, tenants for years determinable on life, not holding merely under a lease at a rent, tenants *pur autre vie*, tenants in tail after possibility of issue extinct, tenants by the curtesy, &c., see sect. 58) may, on observing certain formalities, sell the settled land. These, however, are all special cases, in which you will have to consult the special acts under which the powers are given to ascertain the vendor's ability to sell.

CHAPTER II.

THE PARTICULARS OF SALE.

HAVING ascertained that the vendor is under no personal incapacity to sell, you may take it for granted for the moment that no further incapacity is imposed on him by the nature of his estate and interest in his property. The proper course is to examine the muniments of title and satisfy yourself that he has free powers of disposal, and also clearly to understand what he has to sell. But we will presume that he is unhampered in any way, and can make a good title. You must first learn from him whether the sale is to be carried out privately or by public auction. In the latter case, you will have to prepare the advertisement of the property, and the particulars and the conditions of sale. The preparation of the particulars of sale, indeed, is in many places left to the auctioneer who is selected to carry out the sale, but even if you do not actually draft them, it is your duty to revise them before they are issued, to see that they in no way offend against the law.

Now, with regard to both advertisements and particulars of sale, there are several important points of law which it is necessary to bear in mind, and on these we must dwell for a short time. In promulgating an advertisement or particulars you are promulgating a description of what you propose to sell. Naturally you wish to describe the estate to its best advantage, and publish such an advertisement as will be best calculated to attract purchasers. The point, then, to be considered is, to what extent does the law interfere with your description?

There are two main points to be observed: the one is, not to say too much, the other, not to say too little. As to the first point, it only applies to matters of fact, for in matters of mere opinion you may practically say what you like. Thus you may puff the property to any extent. As long as you confine yourself to generali-

ties you can be as grandiloquent as you please in praising it. Thus, for instance, you may describe land which is a "water-meadow," but very poorly watered, as an "uncommonly rich water-meadow," and the purchaser will not be entitled to rescind the contract, or even so much as to claim compensation on discovering the truth. For opinions may differ as to whether land is poorly or richly watered. (*Scott v. Hanson.*) You may state that the property is worth any sum you like; you may even say, although it be not the fact, that such-and-such a sum has been offered for the property, and by this device try to induce the purchaser to give a higher price than the land is worth. But you must take care not to make a misstatement of a fact, as was done in the recent case of *Roots v. Snelling*. Here the defendant contracted to buy land from the plaintiff for 20,000*l*. At the time of the sale the purchaser alleged that he asked the vendor if the property were the same as that which had been offered to him by an agent of the vendor for 12,000*l*., and the vendor said it was not. The court held the contract was not binding, as the vendor's statement was not merely the expression of an opinion as to value, but affected the subject-matter of the contract, and the purchaser had relied on the statement. The sum of the matter is this:—You say what you like in the endeavour to make a good bargain for your client, but, beyond the commendations and rhodomontade of a person trying to obtain the best price for his wares, you must not go. There must not be the slightest suspicion of a desire on your part to "take the purchaser in;" and if you make any statement which is not quite strictly true, it must be one of such a nature that the court would consider it not likely to be believed by the purchaser, but which would be recognized by him as the mere exaggerated language of one who naturally wishes to say as much in recommendation of the property he has for sale as he can. But you must take the greatest care that any positive statements you make which tend to enhance the value of the property, and which a purchaser would be likely in the ordinary course of things to rely on, are strictly true. It will be no defence to say that you had no intention of taking the purchaser in, or that you were not aware that your representation was not correct; it is your duty to ascertain that every positive statement of fact you make is absolutely true.

There have been many and conflicting cases on the subject of what amounts to a misrepresentation, and further, what constitutes such a misrepresentation as will entitle the purchaser to rescind the contract altogether, and what will merely entitle him to receive compensation for the misdescription, while he is compelled to carry out the contract in spite of it.

It will be useful for you to know the doctrines of Equity on the point, and see in what respects the courts have laid down that misrepresentation amounts to a fraud, which will enable a purchaser to decline to complete, or at all events to insist on compensation before he does so. The first kind of misrepresentation which is considered as amounting to fraud is that which comes within the description of a "*suggestio falsi*," or positive statement of a fact as true which really is not true. With regard to this, it is laid down as follows:—

When a party intentionally or by design misrepresents a material fact or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage over him in every such case, there is a positive fraud in the truest sense of the term. (*Hill v. Lane*.)

And not only does fraud exist where the statements are known to be false by those who make them, but where statements false in fact are made by persons who do not know them to be true or false, or who believe them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known and ought to have remembered the fact which negatives the representation made.

A misrepresentation in order to justify the rescission of a contract must be as to some material fact constituting an inducement or motive to the act or omission of the other party. It must be a *fraus dans locum contractui*, i. e. "the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into the contract; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether." (*Puleford v. Richards*.)

The misrepresentation must also be something in regard to which the one party places a known trust or confidence in the other, so that puffing is allowable. The maxim is, "*Simplex com-*

mendatio non obligat." In mere matters of opinion, where both parties are at liberty to make all examinations and enquiries they like, it is presumed that neither party trusts the other, but relies on his own judgment.

Lastly, to obtain relief on the ground of misrepresentation, the party must have been misled by the representation. If he knows it to be false, it should not influence his conduct, and he has only his own indiscretion to blame. Further, he must be misled to his prejudice or injury. Moral obligations and unconscientious acts followed by no loss or injury do not come within the scope of the remedial jurisdiction of the courts.

Another kind of misrepresentation is that which consists in a "*suppressio veri*" to the injury of another; that is, the concealment or suppression of such facts as the one party is bound in conscience to reveal to the other, and which the other party has a legal as distinguished from a mere moral right to know. (See *Fox v. Macreth.*)

If a vendor sells an estate knowing that he has no title to it or that there are incumbrances on it of which the purchaser is ignorant, and he suppresses the fact, this will make the sale liable to be avoided on the ground of fraud. For the very purchase implies a confidence on the part of the purchaser that no such defect exists. It should be remembered, however, that the maxim in most cases is "*Qui tacet non videtur affirmare*," and the rule of "*caveat emptor*" applies.

Mr. Prideaux, in his excellent dissertations on the subject, sums up the result of the various cases as follows:—

"A purchaser is entitled to rescind the contract—

- "(1) If the misstatement on the part of the vendor is wilful :
- "(2) If the effect of making the purchaser complete would be to put upon him something constitutionally different from that for which he contracted :
- "(3) If the misdescription is such that it may be reasonably supposed that but for such misdescription he would not have entered into the contract at all :
- "(4) If the misdescription is of a nature not susceptible of compensation." (1 Prid. 31, 13th ed.)

But not all misdescriptions will entitle the purchaser to refuse to complete; in some cases he will be forced specifically to perform

his contract, but may demand compensation for the loss he sustains on account of the misdescription. These are cases where the purchaser does not get the identical thing he bargained for, but substantially gets it. The most usual class of cases of this kind are those where there has been some misdescription of the quantity or acreage of the land, and in which the amount thereof as stated does not grossly differ from the amount as it actually exists. Shortly, the result of a misrepresentation which, while it does not come within any of the four above-mentioned heads, and so does not entitle the purchaser to rescind altogether, nevertheless puts on him something less valuable than he bargained for, will be that he must carry out the contract, but may deduct from the stipulated purchase-money such a sum as will compensate him for the loss in value. It would seem that the purchaser waives his right to compensation by taking a conveyance without demanding it. (*Newham v. May*; and see dicta in *Jolliffe v. Baker*.) But in *Palmer v. Johnson* it was held that where there was an express stipulation for compensation, and an error is not discovered till after completion, compensation may nevertheless be still recovered, for the conveyance does not operate to merge the condition as to misdescription.

The practical bearing of all this on the drafting of the particulars is, first, if you make any statement of fact in the description you should take care that you have stated it accurately; and, secondly, if you abstain from mentioning any fact which materially diminishes the value of the property, you must take care that it is not one which the purchaser could not have discovered by himself on using ordinary diligence, or one which you are bound *in foro judicio* to disclose. It is hardly necessary to remark that any actual attempt to conceal a defect will enable the purchaser to get off his bargain.

A word as to sketches and plans of the estate. These very often accompany the particulars. The rules that apply to the particulars apply also to such plans. If through inaccuracy they mislead a purchaser he will be entitled to refuse to complete, even if he might have discovered and corrected the inaccuracy on consulting some document. Having satisfactorily settled the particulars, the next step is to prepare the conditions of sale, a document the object of which is to describe the terms upon which your client proposes to sell

the estate. The drafting of this will require not only an intimate acquaintance with the incidents and peculiarities of your client's title, and a thorough knowledge of the law of real property affecting it, but also the exercise of the most delicate discretion and forethought. You must always bear in mind that while on the one hand it must be your object to save your client from all unnecessary expense, and so to frame your conditions that the cost of investigations, which, in the absence of stipulation would fall on your client, shall be borne by the purchaser, yet on the other you must guard against making the conditions so stringent as to have the effect of "damping the sale," and causing purchasers to offer a less price than they otherwise would. This you must most particularly look to when you are acting for a vendor who is a trustee. It is a trustee's duty to get the best price he can for his *cestui que trusts*, and on that account he should take care to do nothing which would depreciate the value of the estate. If he enters into any stipulations not absolutely required by the state of the title, the *cestui que trusts* can set aside the sale, and this even though the trustee is authorized (as he is now in all cases by Lord Cranworth's Act and the Conveyancing Act, 1881, s. 35) to sell subject to any conditions he may think fit. (*Dance v. Goldingham*, and see *Re Cooper and Allen*.) The *cestui que trusts* should, however, interfere before any part of the purchase-money is paid. And it has been lately decided that where a trustee in selling has inserted an unnecessarily stringent condition he cannot obtain a decree for specific performance of the contract against the purchaser. (See *Dunn v. Flood*.)

CHAPTER III.

THE CONDITIONS OF SALE.

BEFORE we enter into the consideration of the question what provisions the conditions of sale should contain, we will premise that most of them are nothing more or less than the terms which you would insert in a contract, in case you were concerned in a private sale; so that, in speaking in succeeding pages of a contract for sale, we shall refer you to the present chapter to see what terms you should insert in it under various circumstances.

One of the main objects, then, of the conditions is to throw on the purchaser burdens which, in the absence of stipulation, would fall on the vendor. It will be advisable for us in the first place to enquire what these burdens are. In other words, when a vendor and a purchaser enter into an "open contract"—*i. e.* a contract without any stipulations or terms expressly agreed upon by the parties, *e. g.* where A. simply agrees to sell to B., and B. agrees to buy from A., Whiteacre estate for 10,000*l.*—what is the nature of the title which the vendor must produce to the purchaser? The obligations he is now under in such a case are not so burdensome as they were in former days, for recent legislation has contributed to materially lightening them. But still they are sufficiently onerous to make it highly undesirable to enter into a contract which makes no provision for the vendor's protection.

Under an open contract there is implied an agreement that the property is the vendor's to sell and that he will make a good title to it free from incumbrances. This agreement lays him under the following obligations:—

(1) Before 1875, he would have had to have shown a title for a period of sixty years prior to the day of sale. This period was by the Vendor and Purchaser Act, 1874, reduced to forty years (*s. 1*). But this act does not apply to advowsons, so that on the sale of an

advowson he would be bound by the old law and be under the necessity of showing a title for 100 years, or for sixty years with three presentations. (See 3 & 4 Will. 4, c. 27, s. 30.)

(2) The abstract of title would have to show the title for forty years back, and he would have at his own expense to produce all deeds, documents, &c. referred to in it. This, however, is subject to sect. 2, subs. 2, of the Vendor and Purchaser Act, 1874, under which recitals, statements, descriptions of facts, matters and parties contained in deeds, &c. twenty years old at the date of the contract, are, unless proved inaccurate, to be taken as sufficient evidence of the truth of such facts, &c. And it is also subject (in contracts made after 1881) to sect. 3, subs. 3, of the Conveyancing Act, 1881, which provides that the purchaser is to assume, unless the contrary appears, that the recital in an abstracted instrument of any deed, will or other document forming part of the *prior title* is correct, contains all the material contents of such document, and such document was duly executed and completed. The same subsection further precludes a purchaser from requiring the production or any abstract or copy of any instrument dated before the time fixed by law, or by the contract when there is one, as the time for the commencement of the title, and from making any requisition or objection in respect of such prior title; and even where the prior title shows the creation of a power which is exercised by a deed appearing in the abstract, the purchaser is prevented from calling for the instrument creating the power. Further, in contracts made after 1881, the Conveyancing Act throws on the vendor the expense of the production of certain kinds of documents of a semi-public nature not in the vendor's possession, such as acts of parliament, records, court rolls, &c., and also of deeds, wills, probates, letters of administration and other documents, and the expenses of journeys incidental to the production and inspection of them, and also the expenses of making copies of any documents which the vendor is entitled to retain. (See *Re Johnson and Tustin* for a strong illustration of this enactment.)

(3) He would have to bear the expense of getting in any outstanding legal estate, and this is still the case, for no provisions on the point have been made by the recent statutes.

(4) He would have to make good the want or deficiency of stamps.

(5) Prior to 1875, under a contract to grant or assign a lease, he would have had to have shown the title to the reversion, *i. e.* whether the interest out of which the lease he proposes to create or assign was carved, was freehold or leasehold; and he would have had to have shown that its owner had power to create the lease the subject of the contract. He was relieved from this necessity, when the reversion was freehold, by the Vendor and Purchaser Act, 1874, s. 2, subs. 1, but not when the reversion was a leasehold one. In *assigning* a lease since 1881, the assignor need not now show his title, even though it be a leasehold one (Conveyancing Act, 1881, s. 3, subs. 1). But on a contract to *grant* an underlease, the lease out of which the underlease is carved will still have to be shown; but on the grant of a sub-sub-lease the title to the leasehold reversion need not be shown, *i. e.* the original lease cannot be called for. (Conveyancing Act, 1881, s. 13.) Thus, A. has leasehold property: he grants a sub-lease to B.: B. contracts to grant an underlease to C. Here, under sect. 13, C. could not call on B. to show A.'s power to grant the sub-lease to B.

(6) In the special case of the sale of enfranchised copyholds, the vendor had formerly to show, not only the title of the copyholder, but also the freehold title of the lord of the manor down to the time of the enfranchisement, unless the enfranchisement had been effected under the Copyhold Act, 1852, when it was unnecessary to show the lord's title. (*Kerr v. Pawson*.) But now, by virtue of the Conveyancing Act, 1881, s. 3, subs. 2, a purchaser of enfranchised copyholds, whether the enfranchisement took place under the Act of 1852 or not, cannot call for the title "to make the enfranchisement," *i. e.* he cannot call for the lord's title, and possibly he may have to be satisfied with the enfranchisement deed, however recently made, as the root of title.

(7) Again, if his title commenced with a will, he would be put to the expense of having to prove that the testator was seised in possession of the land at the date of his death, no matter how many years ago the testator died.

(8) He would also have to show the identity of the land sold with that described in the deeds as abstracted.

(9) Before 1875, where the deeds were not handed over no purchaser would be compelled to complete without obtaining a legal covenant for their production, and this although he would have an

equitable right to their production. (*Barclay v. Raine.*) Since that date, however, by the Vendor and Purchaser Act, 1874, s. 2, sub. 3, the vendor's inability to furnish such a covenant will not in such a case be an objection to the title, in case the purchaser will have an equitable right to such production.

(10) Formerly, notwithstanding the Vendor and Purchaser Act, the purchaser of leaseholds could, on grounds discovered elsewhere than from the abstract, raise objections to the lessor's power to grant the lease. But now, by the Conveyancing Act, 1881, a purchaser cannot inquire into the circumstances attending the grant of the lease, unless it appear on the face of it or otherwise not duly granted. And further, on the production of the last receipt for the payment of rent due before completion he is bound to assume that all the covenants and provisions of the lease have been duly performed up to the date of completion. A similar provision is made with regard to the sale of an underlease, which requires the purchaser to assume that the superior lease as well as the underlease was duly granted, and, on production of the last receipt for rent, that the covenants of both have been duly performed up to the date of the completion of the contract.

(11) Again, if any deed appeared to have been executed by an attorney he would have to prove to the satisfaction of the purchaser that the donor of the power was alive at the date of the execution of the deed, and further, that the power had not been revoked. Sect. 8 of the Conveyancing Act, 1882, however, now provides that powers of attorney can in certain cases be made irrevocable. We shall have occasion to examine the provision at length in a subsequent chapter.

The above are but a few of the restrictions which hamper a vendor who sells under an open contract, and these are burdens which will fall on him when he possesses even a most unexceptionable title. But when, as is the case nine times out of ten, his title is not absolutely clear or free from difficulty, his selling under an open contract renders him liable to a dozen other inconveniences, and he may find in many an instance that the neglect to guard himself properly against requirements which the purchaser may demand at his expense may so seriously diminish the price paid for the estate that he does not realize by a long way the profit he counted upon making.

Besides the actual loss which may be incurred by the having to clear up at his own expense doubtful points of title, &c., a vendor under an open contract will be put to a vast number of inconveniences. There will be no time fixed for the delivery of the abstract, and for the sending in of the requisitions on title, and no date specified for the completion of the sale. There will be no arrangement as to the taking of possession, as to interest on the purchase-money, or as to the rescission of the contract or compensation in case the vendor is unable to furnish a clear and comprehensive title. The purchaser, too, will run a great risk of entirely losing his anticipated bargain, for should the property consist of a house, and that house should be destroyed by fire before completion, he would not be entitled to any insurance money there might be, but would have the chagrin of seeing the vendor pocket it and the purchase-money as well. (See *Rayner v. Preston*.) And though in such a case the insurance company could compel the vendor to return the insurance money (see *Castellain v. Preston*), yet this would be little consolation to the purchaser, since he would be unable to obtain any portion of it from the insurance company.

Now that you understand what imposts a vendor is liable to who sells under an open contract, you will be able more clearly to grasp the nature of the stipulations which you should insert in the conditions of sale, or in a contract in order to protect him. Whenever you find that there are points in his title which the vendor has the right to have cleared up before completing, you must ask yourself, on whom is the expense of clearing them up cast by law? If upon the purchaser, then you need say nothing about them in the conditions; but if they will fall on the vendor, then you must ask yourself, Shall I by stipulating that the purchaser shall bear these expenses, do anything which is likely to damp the sale? If the reply to this is—No, then you should insert the stipulation; if the reply is—a purchaser might be deterred from giving a good price by such a condition, then you must use your discretion to decide whether it is not better that the vendor should not take on his own shoulders an expense which may be fully balanced by the enhanced price he may get, owing to the absence of strict and deterrent conditions of sale.

In considering conditions of sale we shall adopt the following classification of them :—

- I. Conditions relating to the auction.
- II. Conditions relating to the abstract, the requisitions, the completion and fixing the times for the same.
- III. Conditions relating to the property sold and its identity, &c.
- IV. Conditions relating to compensation for errors, and resale on default to comply with conditions.
- V. Some special conditions to meet special cases.

I. Conditions Relating to the Auction.

These conditions generally provide that the highest bidder shall be the purchaser; that in the event of disputes as to bids, the property shall be put up again; that no one shall advance less than £ at each bid; that no bidding shall be retracted; that the purchaser shall pay a deposit, and sign an agreement to complete the purchase according to the conditions.

There are two points of law which you should notice in connection herewith. First, as to retracting biddings; probably such a stipulation will not bind the purchaser. The purchaser's bid is an offer, and until the fall of the auctioneer's hammer there is no acceptance of it on the part of the vendor, and the law, as you know, is that an offer may be withdrawn at any time before it is accepted. The condition, however, can do no harm. Secondly, as to reserving to the vendor a right to bid. On this point you will remember the Sale of Land by Auction Act, 1867, which provides that on a sale by auction the condition shall state whether the sale is without reserve or whether the right to bid is reserved, and that if it is stated that the sale is without reserve, the seller may not employ anyone to bid for him. The act, you will observe, does not say that if the conditions do not state that a right to bid is reserved, the seller shall not bid, and it seems never to have been decided what would be the effect of silence on the point. The best conveyancers are of opinion that in such a case it would be the same thing as stating that the sale was without reserve.

In connection with the deposit, it is generally stipulated that it shall be paid to the auctioneer. When this is done the auctioneer

holds it as a stakeholder, and may not pay it over to either party without the consent of both. But should it be paid to you as the vendor's solicitor, you would hold it as agent for the vendor, and would have to pay it over to him on demand. (*Edgell v. Day.*)

The object of requiring a deposit is not only to secure a part payment of the purchase-money, but to bind the purchaser to complete. Accordingly, should he unwarrantably refuse to complete, he will generally forfeit the deposit, even in the absence of express stipulation to that effect. (See *Howe v. Smith.*) But, as we shall see, it is usual and advisable expressly to state that he shall forfeit it if he fails to comply with the conditions. But he is not at liberty to elect to forfeit his deposit and refuse to complete; you can always force him specifically to perform the contract.

If the sale goes off owing to your client not being able to make a good title, the deposit will have to be returned to the purchaser, and, in the absence of stipulation, with interest; so that in his interest you should always preclude the right to interest. The purchaser is further entitled to recover the expenses he has been put to in investigating the title, so that you should also provide against this. As to signing a contract, it is hardly necessary for us to remind you of the 4th section of the Statute of Frauds, which requires a contract relating to the sale of land, in order to be actionable, to be in writing, signed by the party to be charged or his agent lawfully authorized. But we may remark that the auctioneer is an agent within the statute, and his signature of the highest bidder's name in his book will be binding on such bidder. It is, however, advisable to have the purchaser's own signature, in order to secure that a proper description of him should appear to the contract. For to satisfy the statute a sufficient designation of the purchaser must be given. It is not absolutely necessary to have the purchaser's name and address, &c. Any description of him which will identify him will be enough. The vendor's name should also appear to the contract if he is to be bound by it. The same observation as to sufficient designation applies to him also. It has been held that a description of him as "the proprietor" or "trustee for sale" will satisfy the statute. (See *Sale v. Lambert* and *Catling v. King.*)

II. Conditions relating to the Abstract, &c.

Analyzing the usual conditions on this head, we shall find they include the following elements :—

- (a) Requisitions on title to be sent in so many days after the delivery of the abstract, or they will be deemed waived.
- (b) If the purchaser insists on any requisition which the vendor is unable to comply with, he may rescind the sale, and return the deposit without any interest or costs. Purchaser, however, to be at liberty to withdraw any such requisition within a specified time after receiving notice of rescission, in which case the notice to rescind will be deemed withdrawn also.
- (c) Remainder of purchase-money to be paid on such-and-such a day, and matters completed at the vendor's solicitor's office. If from any cause the purchase be not completed on that day, purchaser to pay interest on the balance of the purchase-money.
- (d) Purchaser entitled to possession from such-and-such a day, all outgoings up to that day to be cleared by the vendor, and rents, &c. to be apportioned.
- (e) Abstract to be delivered on such-and-such a day, and to commence with such-and-such a document.

(a) *As to Requisitions.*

The first remark we have to make on this head is, that the law has interpreted the words, "delivery of the abstract," to mean the delivery of a *perfect* abstract; that is to say, an abstract which sets out fully every document which forms part of the vendor's title, and states every material fact, must be furnished to the purchaser, or else it will not amount to the delivery of an abstract at all, for the purpose of estimating the time within which the requisitions are to be sent in. (See *Blacklow v. Laus.*) For instance, the abstract will be imperfect if it shows that there are incumbrancers whose consent is necessary, but whose concurrence the vendor is not entitled to require; or where the vendor is a trustee for sale, but the time for sale has not arrived. (*Want v. Stallibras.*) But the abstract is not imperfect, even if it shows that

there are outstanding interests if the vendor can require them to be got in (*Avarne v. Brown*), or although the vendor has not at the date of the delivery of the abstract got the fee simple of the estate, provided he can acquire it by executing a disentailing assurance. (See judgment of M. R. in *Sidebottom v. Barrington*.) These cases will serve to remind you how important it is that you should deliver a legally perfect abstract if you wish this condition to have its intended effect. For if you do not deliver a perfect abstract within the time stipulated in the conditions, the purchaser will not be bound to send in his requisitions within the time named. It is sometimes the practice to guard against this by stipulating that the time shall be computed from the delivery of the abstract, whether the abstract is perfect or not; but such a condition is not to be recommended, as it may deter an astute purchaser, and have the effect of damping the sale.

As to the condition that requisitions and objections not made within a specified time shall be taken to be waived, it is usual to state that the time limited "shall be of the essence of the contract." You will remember that the equitable, and (since the Judicature Act, 1873) the legal doctrine is, that time is of the essence of the contract only where made so by express stipulation, or by necessary implication. And, further, though not originally of the essence of the contract, it may be made so by one party giving the other a notice to do the stipulated act within a given time, so long as the time mentioned in such notice is of a reasonable length. (See *Crawford v. Toogood*; *Green v. Sevin*.)

(b) *As to Rescission of Contract.*

There are two important points of law for you to bear in mind in connection with the condition as to rescinding the contract on inability or unwillingness to answer a requisition or comply with an objection. The first is, that it will not enable a vendor with impunity to get out of his contract any more than the forfeiture of the deposit will empower the purchaser to refuse to complete. He is *prima facie* bound to do his best to make out a good title, and do all he can to satisfy the purchaser's objections; and having done his best, he must leave matters for the purchaser to say whether he will accept such title as he can give him. (*Turpin v. Chambers*;

and see *Re Monkton and Gilzean*.) This condition then, you will see, is of no advantage to the vendor, except in the case of the purchaser insisting on some unwarrantable requisition or objection. It will not, for instance, enable him to rescind the contract, and so escape an action for damages in a case where he has no title at all. (*Bowman v. Hyland*.) Nor will it enable him to rescind and so avoid the expense of obtaining the concurrence of some incumbrancer, whose concurrence is necessary to make a clear title. (*Greaves v. Wilson*; and see *Re Jackson and Oakshott* and *Hardman v. Child*).

A second point is, that it will not authorize the vendor to play fast and loose with the purchaser; if he means to take advantage of the condition he must do so in a decisive manner and once for all. Thus it has been decided that he will lose his right to rescind, if he, subsequently to notice of rescission, expresses his willingness, or enters into a correspondence with a view to answering the objection. (*Tanner v. Smith*.)

To obviate this, it is often the practice to add a proviso that the power to rescind shall remain in force "notwithstanding any attempt to remove the objection."

(c) *As to Payment of Balance of Purchase-Money.*

Under this head two observations only seem necessary. The first is, as to the place where the conveyance is to be executed. Before the Conveyancing Act, 1881, it was a doubtful point whether the purchaser could insist on having the deed executed by the vendor in the presence of his (the purchaser's) solicitor. (See *Viney v. Chaplin*.) But by sect. 8 of that act it was provided that the purchaser should not be entitled to have the conveyance to him executed either in his or his solicitor's presence, but that he might at his own cost have the execution by the vendor witnessed and attested by some person appointed by him, and such appointed person might be his solicitor.

The second point is, as to the payment of interest on the purchase-money. The purchaser is bound by law to pay interest on the money remaining unpaid at the date of completion, but he can always relieve himself from the necessity of doing so by providing himself with the money and giving the purchaser notice that it is

lying idle, that is, of course, where the delay is not his fault. (*Regent's Canal Co. v. Ware.*) But the usual condition provides that he shall pay this interest from whatever cause the delay to complete arises. It needs no great exercise of common sense to understand that this condition will not apply to cases where the delay is caused by some wilful act or default on the vendor's part. But suppose the delay is caused not by any default on the part of either vendor or purchaser, but is occasioned by the state of the title. Is the purchaser to pay interest in this case? It has been held that he must do so. Thus in *Bannerman v. Clark* the delay was caused by the death of the vendor and the devolving under his will of the legal estate on an infant. Here the purchaser, although the delay arose from circumstances entirely out of his control, was held liable to pay interest under this condition. (See also *Williams v. Glenton.*) But in quite a recent case (*Gold and Norton's Contract*), it was held by Mr. Justice Kay, that even where there is the usual stipulation as to payment of interest, the purchaser can avoid the liability to pay the same by giving notice that his purchase-money is ready and lying idle at the bank, in a case where the failure to complete arises more from the fault of the vendor than of the purchaser, and this, even though the purchaser may take the profits from the date fixed for completion.

(d) *As to Possession.*

There are two or three points of law which we may take the opportunity of considering under this head. First, the purchaser is, in the absence of stipulation, entitled to possession and to the profits of the estate from the time fixed for the completion. And as soon as he takes possession, he will come under the liability to pay interest on the purchase-money. And if there is a stipulation that possession shall be given by a certain day, that implies a contract that possession with a good title will be given. (*Tilley v. Thomas.*) Should no time be fixed for completion, the vendor will be allowed a reasonable time for making out his title. (*Sanson v. Rhodes.*) Where the conditions are silent on the subject of taking possession the purchaser should be very careful how he does so. He will not indeed render himself liable to pay anything for the use and occupation of the premises should the sale fall through

by reason of the title turning out defective; but in some cases the taking of possession will amount to a waiver of objections to the title. This will not, however, be the case if it is taken in accordance with the intention of the parties, as evidenced by the parties' contract, or by special consent of the vendor. (See *Stephens v. Guppy*.)

We shall consider in subsequent pages the consequences which follow from the contract to sell, and the position in which the purchaser stands with reference to benefits to the property arising after contract, and what risk he runs from the deterioration or destruction of the property from that date, particularly in the case of fire.

(e) *As to Delivery of Abstract.*

We have seen (*supra*) that in the absence of stipulation the vendor is allowed a reasonable time for making out his title, and we have also pointed out the necessity of delivering a perfect abstract at the stipulated time, when any time is expressly contracted for.

The only part of this condition which we have to comment upon is that which provides for commencing the deduction of the title from a given date. If there is no stipulation to the contrary the purchaser, as we have pointed out, is entitled to have produced to him a forty years' title. Whenever feasible it is of course advisable to show at least this length of title, but in many cases this cannot be done or cannot safely be done. In such cases it becomes necessary to insert stipulations restricting the purchaser's legal rights. This is always a risky expedient, because it impliedly warns an intending buyer that there may be something suspicious about the title, and the effect of it may be to damp the sale. Thus in some cases it may be found necessary to restrict the length of title to be shown to twenty or thirty years; indeed, under special circumstances vendors sometimes stipulate that the purchaser shall take such title as the vendor happens to have. Such a stipulation, though by no means to be recommended, is perfectly legal, and a purchaser buying under it cannot complain if he gets a defective title. (*Freme v. Wright*.) And sometimes even, when the title is one which is very well known in the neighbourhood, it is the practice to stipulate that the purchaser shall not require any

further evidence of title than the conveyance to the vendor. Now in shortening the length of title supplied there is one point to be borne in mind—if you have a defective title you must not attempt to hide it by making the abstract commence with some instrument subsequent to the defect. If the production of a document dated anterior to the stipulated time would show, for instance, that your client while professing to sell the fee had only a life estate, or that the property was subject to a mortgage, the purchaser would be justified in declining to complete should he discover the fault, and even the implied provisions of the third sub-sect. of sect. 3 of the Conveyancing Act, 1881, that no objection should be made to the prior title, or an express stipulation to the same effect, would not preclude the purchaser from objecting should he obtain a knowledge of it. (See *Smith v. Robinson*.) If the title is bad your duty is to show on the conditions the nature of the defect and provide that a purchaser shall make no objection on account thereof. Any attempts to mislead the buyer will prove futile. This is well illustrated by the case of *Edwards v. Wickwar*; here the conditions provided that no objection should be made in respect of a certain underlease which was named, or in respect “of any other underlease prior to” a certain date. It turned out that there was another underlease known to the vendor, and it was held that he ought to have disclosed it, and that the condition did not relieve him from the necessity of so doing. Again, if the conditions state as a fact that the vendor has power to sell the fee he will not be able to frame any stipulation which will prevent the purchaser from requiring him to show that power. (*Johnson v. Smiley*; see also *Re Marsh and Granville*; and *Cumming to Godbolt*.)

III. Conditions relating to the Property sold and its identity.

We now come to those stipulations which are inserted when the vendor intends to curtail the general description of the property offered for sale. On this head but few words are necessary. Land, as you know, includes all above it *usque ad coelum*, and all below it *usque ad inferos*; therefore, in the absence of stipulation, the sale of land will pass the trees and generally all the erections

and fixtures upon it. Therefore, if you wish the timber to be paid for separately you should provide to that effect and make arrangements for having it properly valued. The same remark applies to the fixtures. Again, any reservations you may wish to make should be mentioned. Thus, if you desire to reserve the mines and minerals or a right of way, or to make any exception whatever out of the grant, you must be careful clearly to express that desire. Another important matter relating to the property sold is the condition usually inserted limiting your legal liability to identify, to the satisfaction of a purchaser, the identity of the property you offer for sale with that described in and conveyed by the title deeds. In the absence of stipulation to the contrary, you are bound to furnish proof of this identity; and as this is never a very easy matter, it is generally advisable to make it a condition of the sale that the purchaser shall not require any evidence of the identity of the property as described in the particulars with the property as described in the abstracted documents other than a statutory declaration, which is to be furnished, if he requires it, at his expense; such statutory declaration, when furnished, generally states that the property has been consistently held with the title shown by the abstract for a period of twenty, or more or less, years.

With regard to conditions as to identity, there have been two decisions which it is worth while to bear in mind. In the first, *Flower v. Hartopp*, where there was a condition that no further evidence of the identity of the parcels should be required than what was afforded by the abstract, or by the deeds, &c. therein abstracted, and the descriptions in the documents differed amongst themselves and from the description in the particulars of sale, it was held that the purchaser was entitled to have some proof of the identity *aliunde*. For the deeds themselves did not here afford evidence of identity, but constituted the subject of doubt as to the identity. And in *Curling v. Austin*, where the condition was that the purchaser should not require any further proof of the identity than was furnished by the title deeds themselves, it was held that this amounted to a contract that the deeds should show identity, and that if they did not a good title was not made out; whereas, if the deeds did not show identity the pur-

chaser could not call for any other evidence. This amounts pretty much to saying that such a condition is useless; for if the deeds do show identity the purchaser, presumably, will be satisfied and will not want any further evidence; while if they do not show identity, he can refuse to complete the contract, a good title not being made out.

IV. Conditions relating to Compensation.

We come now to conditions relating to compensation for misdescription in the particulars. We have already seen what effect a misdescription has on the sale when the conditions are silent on the point, *ante*, p. 23. Let us first see what the usual form of condition is. Prideaux gives it as follows:—

“The quantities stated in the particulars shall be presumed to be correct, and an error as to quantity, if any such shall be found, shall neither annul the sale nor entitle either party to compensation on account thereof. If any other mistake shall be found in the particulars before the completion of the purchase the same shall not annul the sale; but a fair compensation shall be made in respect thereof to or by the purchaser, as the case may require,” and then the condition goes on to provide for the settlement of the amount of compensation in case of difference by arbitrators. He also gives as a substitutive and more strict clause the following:—
“The description of the property in the particulars is believed to be correct; but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed in respect thereof.”

Several occasions for remark arise out of the consideration of this condition. In the first place, we have seen that even in the absence of any stipulation a purchaser can be compelled to take the property with an abatement in the purchase-money when there is a slight and unintentional misdescription. (*Ante*, p. 25.) And we have also seen that even where there is such a condition there are cases in which, in spite of it, the purchaser will be justified in peremptorily declining to carry out his contract. Thus, then, it is evident that the question of the construction of this condition can only come into debate, when the misdescription is not of such a nature as would merely enable the purchaser to ask for an abate-

ment in price and leave him still compellable to fulfil his contract; and further, where it is not of such a gross nature as would entitle him to rescind the contract altogether. The condition only applies then when the misdescription is too serious for a Court of Equity merely to order compensation, and yet not serious enough to give the purchaser the right to rescind. In these cases the purchaser will be bound by the condition, and will be forced to carry out the contract and accept compensation, when in the absence of stipulation he might make a successful appeal to the court to be relieved from it.

It should be noticed that when there is an error in the quantity of the parcels as described, and the purchaser knew of that error, he will not be entitled to compensation under this condition, but it is for the vendor to show the purchaser's knowledge.

As to the stipulation that the condition shall only relate to errors discovered before the completion, it has, as we have seen, been decided in the recent case of *Palmer v. Johnson*, that where the contract provides that compensation shall be made for errors, the fact that the purchaser does not discover the error till after the conveyance is executed does not prevent him from taking advantage of the condition, and that the contract is not, for this purpose at least, merged in the deed. This case would seem to overrule *Jolliffe v. Baker*, *Manson v. Thacker*, and *Allen v. Richardson*, and restore the rule as laid down in *Re Turner and Skelton*. *Perriam v. Perriam* simply decides that where the error is discovered before completion the purchaser does not necessarily waive a claim for compensation by taking a conveyance of the property under its correct description.

As to the second or substitutive clause above given, it will only extend to slight and comparatively immaterial errors in quantity. (*Whittemore v. Whittemore*.) And generally these conditions are not so formidable as they look, for no condition will preclude a purchaser from requiring compensation or rescinding the contract in cases where by the ordinary doctrines of equity he would be

do so were there no condition.

al form of conditions provides that if the purchaser fails with the conditions he shall forfeit his deposit, and the y re-sell the property and recover any difference in difference to be considered as liquidated damages;

and further, that it shall not be necessary for him to tender a conveyance before re-selling. As to this, even in the absence of stipulation, a purchaser who fails to complete forfeits his deposit (*Depree v. Bedborough*, and the vendor has the right to re-sell and recover any deficiency, so that the condition appears merely declaratory of the vendor's rights. It seems to be doubtful whether a tender of a conveyance is necessary before exercising the right to re-sell, so it is better clearly to state that such tender shall not be necessary. The deposit, even when paid in part payment of the purchase-money, is considered as a security that the purchaser will complete, so that if he is guilty of such conduct as amounts to a repudiation of the contract, and the vendor re-sells, he cannot recover the deposit. (*Howe v. Smith*.)

V. Some Special Conditions.

The above may be said to be the conditions under which you will sell by auction in ordinary cases. But sometimes the nature of the property and sometimes the peculiar state of the title will render other and special conditions necessary. We propose now to consider a few of these special conditions, dividing them roughly into (1) those required by the nature of the tenure of the land, and (2) those rendered necessary by defects, special circumstances, &c. in the title.

1. *Special Conditions required by the nature of the Tenure of the Land.*

(a) With regard to titles registered under the Land Transfer Act, 1875, you may recollect that under this act an owner of land may register it with an absolute qualified or possessory title. It will be unnecessary to fetter the sale of lands registered with an absolute title with any conditions; but when registered with a possessory or qualified title only, as this does not guarantee the goodness of the title prior to the date of registration, or before some specified date, it will be necessary to have a stipulation that the purchaser shall not investigate the title prior to the registration, or else he will be entitled to have the usual forty years' title deduced to him. He

should be required to assume that at the date of registration no estate, right or interest adverse to or in derogation of the vendor's title was subsisting or capable of arising.

(b) As will be gathered from our remarks on open contracts in a previous page, no special condition need now, in consequence of the Conveyancing Act, 1881, s. 3, subs. 2, be resorted to on the sale of enfranchised copyholds.

(c) As to lands inclosed and which have been allotted by an award made under the Inclosure Act, 1845, or by any general Inclosure Act, the purchaser, in the absence of stipulation, is entitled to have shown to him the title prior to the award as far back as forty years at least, and also to be satisfied as to the regularity and validity of the award. The vendor should provide against this by a proper condition.

(d) If the property has been the subject of a common law exchange prior to 1845, the vendor will have to show the title to the lands given in exchange as well as to those taken; so that here is another case in which the purchaser's right should be curtailed by a condition. But if the exchange has been effected under the Inclosure Act of 1845, s. 147, the title to the land given in exchange is transferred to that taken, so that title will have to be shown for forty years back to the land given in exchange up to the date of the exchange, and then to the land taken in exchange. A condition may again here be advisable to restrict the purchaser's rights.

(e) In case the title to the land offered for sale is derived from a grant from the Crown the purchaser's right to call for a copy of such grant should be negatived.

(f) As to leases and underleases we have seen that by the Conveyancing Act, 1881, and the Vendor and Purchaser Act, 1874, a purchaser of a lease or underlease cannot now call for the title to the reversion, be it a freehold or a leasehold one. (*Ante*, p. 29.) The lease—the subject of the sale—has, however, to be produced, with the mesne assignments for forty years previous to the date of sale; and as the above statutes do not seem to prevent objections being made as to the validity of the original lease on grounds appearing on the face of it, or discovered *aliunde*, you should, when you cannot produce the original lease, stipulate for its non-production and debar the purchaser from making any objection or requisition as to the lessor's or the previous title, and require him to

assume that the lease was well granted. And when certain mesne assignments are not produced he should be further required to assume that such assignments operated to vest in the vendor a good title for the residue of the term. Again, if the original lease required that a licence should be necessary previous to assigning, it will be advisable on a sale by an assignee to require it to be taken for granted that such licence was duly obtained; for the acceptance of rent by the lessor (should no such licence have been obtained) would only amount to a waiver if he had notice of the assignment. Once more, if the subject of the sale is a lease which has been renewed the purchaser's right to call for the surrendered leases ought to be negatived. It will now be unnecessary to insert any stipulations as to the assuming that the rents have been paid and the covenants and conditions of the lease have been duly performed, for the Conveyancing Act, 1881 (s. 3, subss. 4, 5), provides, that on the sale of a lease and the production of the receipt for the last payment of *rent* (which will not include a peppercorn rent, *Re Moody and Yates' Contract*) due before completion, the purchaser is to assume that all the covenants of the lease have been duly performed up to the date of completion; and that on the sale of an under lease on the production of a similar receipt the purchaser is to assume that all the covenants of the superior as well as of the underlease, and the rent due under the latter, have been paid and performed up to the date of the sale. Some conveyancers, however, do not think these conditions stringent enough, and still use the old common form condition, which makes the production of the last receipt for rent *conclusive* evidence that the rent has been paid and the covenants performed.

2. *Special Conditions rendered necessary by the peculiar state of the Title or defects thereof.*

These, of course, are very numerous, and must be framed to meet the peculiar circumstances of each case. We can do no more here than mention some few of those which are of more frequent occurrence. As we have already mentioned, when the title is defective the proper and safest course is to state in the conditions what the defect consists in, and then provide that the purchaser shall make no objection on account of it.

(a) If the title commences with a devise, you should provide that

the purchaser is to assume that the testator was seised in fee at the date of his death, and require no other evidence of his being so than a statutory declaration to that effect to be furnished at his expense. Otherwise the purchaser will be entitled to evidence of seisin at your client's cost.

(b) If any deed has been executed under a power of attorney which does not come within sects. 8 or 9 of the Conveyancing Act, 1882, and so is not irrevocable, you should have a condition requiring the purchaser to assume that the donor of the power was alive at the date of the execution of the deed.

(c) If, in any deed dated prior to 1882, there is no receipt for the purchase-money indorsed and signed by the proper parties, you should take care to provide that no objection be made on that ground. As to deeds executed after 1881, the act mentioned provides that a receipt for the consideration in the body of the deed shall be a sufficient discharge without any further receipt being indorsed, and that such a receipt or an indorsed one shall, in favour of a subsequent purchaser without notice that the consideration was not in fact paid or given, be sufficient evidence of the payment or giving thereof (sects. 54, 55).

(d) Where the legal estate is outstanding in some trustee or mortgagee, but the active duties of the trust have ended, or the mortgage has been paid off but no reconveyance taken, and where a fair and reasonable time has elapsed, and in subsequent dealings with the property the outstanding of the legal estate has been disregarded or treated as got in, you should provide that the legal estate shall have been presumed to have been reconveyed.

(e) If the property is stated to be free from land tax or tithe, and in the case of the land tax you cannot produce the certificate of the Commissioners showing it to be free, or in the case of tithes cannot produce evidence to show that the land is discharged from them, you should provide that no inquiry shall be made on the point. Sometimes it is stipulated that a declaration of the land-tax collector, or by some other person, that the land is free from the tax, to be furnished at the purchaser's expense, shall be accepted as conclusive evidence.

(f) If any of the documents of title are found to be unstamped, it should be stipulated that the purchaser shall bear the expense of

properly stamping them if he thinks it necessary. In framing this condition care must be taken not to provide that the deed shall not be stamped, for a contract with such a clause, being prejudicial to the revenue, might be deemed invalid. (See *Whiting to Loomes*.)

(g) A voluntary deed may, as you know, become void in case of the grantor being adjudged bankrupt within ten years of its making, unless it can be shown that he was able to pay all his debts at the time of making it without the aid of the property settled (46 & 47 Vict. c. 52, s. 47), and such a deed is also liable to become void at any distance of time under 13 Eliz. c. 5. (See *The Three Towns Building Co. v. Maddison*.) So that if your title commences with such a settlement, the purchaser will be likely to call for evidence of the donor's solvency. It is usual to stipulate in this case that he shall be satisfied thereof by a declaration to be made by one of the donor's family.

(h) To preclude troublesome inquiries it is often provided that the purchaser shall assume that no holder of the land who died left a widow surviving him who may still be living, and so entitled to dower. This would be the case, as you know, if the widow was married prior to 1834.

(i) If any of the originals of the deeds appearing in the abstract are missing, the purchaser should be required to accept an attested copy or some other such evidence in proof of them.

(k) Finally, when there are any incumbrances on the property which your client cannot discharge, you should make careful provisions for his protection. You must clearly state the fact and nature of such incumbrance, and require the purchaser to make no objection on account of it. It is only fair to offer to give him an indemnity against any charge. Bear in mind that in the absence of stipulation he cannot be forced to complete a contract to buy land which turns out to be subject to irremovable incumbrances, even on being offered an indemnity. (*Balmano v. Lumley*.)

In connection with these incumbrances we will just call your attention to sect. 5 of the Conveyancing Act, 1881. This enables any party to a sale of land subject to incumbrances (whether payable immediately or not), to apply to the Chancery Division, and on paying into court such sum as when invested in government

securities may be considered sufficient, by means of the dividends thereof, to keep down any incumbrance to which the land is subject, with such further sum, not exceeding one-tenth of the original amount to be paid in, to meet contingencies, to obtain a declaration that the land is free from the incumbrance. The court, further, has power to direct all needful conveyances to be made, to make vesting orders, and deal with the fund in court, and finally pay it over to the person entitled to it. This provision will prove useful in those cases where the incumbrance cannot be paid off and a sufficient indemnity cannot be given, or an indemnity is refused. (For cases on this section, see *Dickin v. Dickin*; *Great Northern Rail. Co. v. Sanderson*.)

We will now assume that you have prepared all proper and necessary particulars and conditions of sale, and have duly advertised the time and place of the auction. We will next suppose that the day of sale has arrived. In connection with the proceedings at the auction itself, there are two or three points worthy of your consideration, and these we propose to consider under distinct heads :—

(1) *The Vendor's right to bid.*

As the highest bidder at the auction will become the purchaser, and there is nothing to prevent that bid being a very low one, it is evident that there is a great risk of the land being sold at a much less price than it is worth. It became, therefore, the practice for the vendor to employ "puffers" at the sale, whose business it was to run up the bids in the interest of the vendor. Now, at law the private employment of these "puffers" was a fraud, and would vitiate the sale; but in equity it seems that one person might be employed to bid secretly in order to prevent the property being sold at an undervalue. (See *Mortimer v. Bell*.) The law on the point, however, is now regulated by 30 & 31 Vict. c. 48, which renders the employment of a "puffer" illegal both at law and in equity. It further provides that the conditions of sale shall state whether the sale is "without reserve" or not, and if stated to be without reserve, no one can be employed to bid on behalf of the seller. If the right to bid is stated by the conditions to be reserved (see *Gilliatt v. Gilliatt*), the seller or any one person on his behalf may bid at the sale. Thus

the property may be prevented from being sold at less than its value, and withdrawn in case the reserve price is not reached. The case cited shows that to avail himself of the right to bid, not only must the vendor state the sale to be subject to a reserved price, but also that the right to bid is reserved.

(2) *How far can the Conditions be varied at the Sale.*

Shortly stated, the rule is that the written conditions of sale cannot be affected or altered by any verbal changes made at the sale. They must stand as they appear in the writing. The rule at law was that evidence of a parol variation of a written document was totally inadmissible. And even in equity it was only admitted in certain cases of accident, mistake or fraud. Since the Judicature Act of 1873, the equitable rule will prevail; still for most intents and purposes the rule holds good that written conditions of sale cannot be verbally varied. And this is so even where the purchaser has agreed in writing to abide by the conditions and declarations made at the sale. (*Vide Gunnis v. Erhart.*)

This point as to a parol variation of the conditions of sale generally arises in an action for specific performance of the contract brought either by the vendor or the purchaser. It may arise in two ways:—(a) The vendor may bring an action for specific performance against the purchaser, seeking to have the contract carried out, not simply as it appears from the writing, but with a parol variation made, as he alleges, at the time of sale. In such a case the rule is that he will not be allowed to adduce evidence of such parol variation. To this rule, however, an exception has been established, and this is where the parol variation is one which alters the written contract in the favour of the defendant. (*Martin v. Pyecroft.*) The same rule applies to a purchaser seeking specific performance with a parol variation. When, however, there has been a part performance of the parol variation alleged, if it amounts to such a part performance of that variation as would justify the Court in ordering specific performance had the variation been itself a new contract, then the Court will generally enforce specific performance of the original contract as modified or altered by the variation. (b) But when a vendor or a purchaser is resisting specific performance he may go into parol evidence to show

that by fraud, accident or mistake the written agreement does not express the real terms arrived at by the parties.

The only safe way when the conditions are in anywise altered or added to, as the contract is to embody the alteration or addition in the original conditions, and see that the purchaser or the vendor, as the case may be, signs them with full knowledge of the variation.

In the vendor's interests it is advisable that the deposit be paid to the auctioneer: for he holds it as agent for both parties. But as the auctioneer is selected by the vendor, he will have to bear any loss which may arise, owing to the fraud, bankruptcy, &c. of the auctioneer.

CHAPTER IV.

CONTRACT FOR SALE AND PURCHASE.

THE auction completed, and a purchaser found, the next step is to prepare the abstract of title. But it will perhaps be advisable to break off the continuity of our history for a while, and before going into the subject of abstracts, to treat of private contracts for sale. For, these disposed of, our subsequent chapters will relate to the proceedings on a sale, whether that sale be by public auction or private contract.

In treating of the stipulations which should be included in the conditions of sale, we have anticipated all that is necessary to be said with regard to the provisions which should be inserted in a contract. For, with the exception of the conditions relating to the auction, all the stipulations which you would comprise in particulars and conditions of sale, you would, under the same circumstances, include in a private contract. There is, however, this difference, that in framing a private contract, you need not be so chary about inserting stringent conditions, for as the purchaser has probably made up his mind to buy, he is not likely to be frightened from his bargain by their stringency, and there is no fear of "damping the sale."

We propose to treat of the subject of contracts under the following four heads :—

- I. What is an interest in land within the 4th section of the Statute of Frauds.
- II. What are the requisites of a valid contract under that statute.
- III. What acts of part performance will take a case out of the statute.
- IV. What is the position of the parties after the contract has been made.

I. What is an Interest in Land within the 4th Section of the Statute of Frauds.

The 4th section of the statute requires, as you know, that no action shall be brought in any court for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the contract is in writing signed by the party to be charged, or some person authorized by him. As to what constitutes an interest in land under the statute, the decisions are many and conflicting, and for a comprehensive view of them you must have recourse to some of the standard works on contracts. All we can do in the present treatise is to attempt a brief summary of the law on the subject. We then offer the following points for your consideration:—

- (a) Is a contract for the sale of “growing crops” within the statute? i.e. is a growing crop an “interest in land”? It seems that if the crop sold is a “*fructus naturalis*,” such as growing grass, timber, or underwood, the contract must be in writing: but if it is a “*fructus industrialis*,” i.e. a crop not produced spontaneously, but raised by the labour of man, e.g. corn, potatoes, or turnips, writing is not necessary under this section. (See *Evans v. Roberts*.)
- (b) Whether a contract for the sale of hops or clover is within the clause is doubtful. (See, on the one side, *Waddington v. Bristow* and *Rodwell v. Phillips*, and on the other, *Graves v. Weld*.) A sale of hops is probably not an interest in land, as hops pass, under the head of “emblements,” to a deceased owner’s personal representatives; while a sale of clover, which is not an emblement, as it does not come to perfection within a year of sowing, is probably an interest in land within the clause.
- (c) Contracts for the sale of shares in mines are within the section.
- (d) Contracts for leases and the sale of leasehold interests in land are within the clause, so that while a lease for a term not exceeding three years at two-thirds of a rack-

rent is good, though made by parol, all agreements for leases, no matter what the length of the term, must be in writing.

- (e) Contracts for taking or letting furnished lodgings are within the statute, if any specific rooms are let; but a contract to live in a boarding house is not within it, as there is no intention to give the lodger the right to the exclusive occupation of any particular part of the house.
- (f) An agreement for the sale of tenant's fixtures is not within the section (*Lee v. Risdon*), nor is an agreement to build a house, though implying a licence to go on the land. The general rule to test whether any interest is an interest in land is to apply the question, Is it an interest which on the owner's death would go to his executors? If it is not, then a contract for the sale of such interest must, as a rule, be in writing.

II. The Requisites of a Valid Contract.

It must be signed by the party to be charged or his agent (who may be appointed by parol); it is not necessary that it should be signed by both parties. It is necessary for the following particulars to appear—(a) the consideration, (b) the subject-matter of the sale, (c) the names or description of buyer and seller, (d) the terms of the contract. The signature need not be at the end of the contract, it may be at the beginning or in any part of, but it must appear in writing somewhere. (*Saunderson v. Jackson*; *Hubert v. Treherne*.) Where a contract purported to be made between certain persons whose names appeared at the commencement and ended, "As witness our hands," and no signatures followed this testatum; here it was held that this was not a sufficient signing within the statute.

As we have already seen (*ante*, p. 33), it is not necessary for the buyer's or the seller's name to appear (except in so far that the contract must be signed by the party to be charged), but a mere description of them is sufficient, provided it be clear enough to designate who they respectively are.

The rule is that the agreement as appearing in the writing must comprehend all the terms of the contract, and no parol evidence

will in general be allowed to add to, vary or explain it. But if it refers to some other writing or document containing further terms, such further document will be considered as incorporated, and be received in evidence to show what the terms of the contract are. (See *Ridgway v. Wharton*.)

One of the most frequent cases in which you will be called upon to consider whether a contract which satisfies the statute has been consummated will be the following:—Your client will have been in negotiation for the sale or purchase of an estate, and will lay before you the correspondence which has passed between him and the other party, and it will then be your duty to peruse it and see if a contract has been arrived at or whether matters have only reached an initiatory stage, and there is nothing binding on either side. The rule, when the existence of a contract is to be gathered from a correspondence, is, in the words of Cotton, L.J. (*Lewis v. Brass*), that “there must be an unqualified acceptance of the offer, and no new term must be introduced. If a new term is introduced, there is no contract.” This, then, must be the point which you must bring to bear in examining the letters, and whenever you find an offer on one side you must use your judgment in coming to a conclusion as to whether it is accepted in terms which add no new condition to the bargain. There is a class of cases which have been rather common of late, and perhaps on this ground we shall be justified in calling your attention to them at more length. These are cases in which the party, in accepting an offer made to him, points forward either expressly or impliedly to the preparation of a formal contract on the close of the correspondence. Here the question may arise whether there has been a simple acceptance of the proposal, with a suggestion as to the future course to be pursued, or whether there has been a mere conditional acceptance and the parties do not intend to consider themselves bound until they are irrevocably so by the subsequent formal instrument alluded to. Thus A. may write to B. and say, “I will sell you Blackacre for a thousand pounds,” and B. may reply, “I will take it at that price subject to the title being approved of by my solicitor.” Here the question arises, Has B. accepted A.’s offer simply, or has he introduced a new term into the contract which will require A.’s unqualified assent before the agreement can become binding? There are several cases on the

point which will well repay the trouble of perusal, but we can do no more than mention them. The leading case is *Hussey v. Horne-Payne*, and other important cases are *Lewis v. Brass* (*supra*), *Bransom v. Stannard*, *Rossiter v. Miller*, *Bonnewell v. Jenkins*, *Crossley v. Maycock*, and the very recent case of *Eadie v. Addison*. The rule to be deduced from the above decisions would seem to be that where an offer is accepted simply, but the acceptance is accompanied by a statement which in effect expresses the acceptor's desire that the terms of the contract shall be embodied in a more formal document, the addition will not prevent the offer and acceptance from constituting a binding contract; but if it appears from the reference to the subsequent and more formal contract that either party intended that to be the binding instrument, then the mere offer and acceptance will not form a binding agreement.

In connection with these offers and acceptances, you will remember that an offer may be withdrawn at any time before it is accepted (*Dickenson v. Dodds*); and that the offer will bind the writer from the time that the acceptance is posted. (*Thomas v. Blackman*.) Further, if the offer stipulates that the acceptance shall be made by a fixed day, if the acceptance is made by that day, there will be a binding contract, although by some delay the letter containing the acceptance does not reach the person who made the offer till after the day named. (*Adams v. Linsell*.)

III. What Acts of Part Performance will take a Case out of the Statute.

At law, if the Statute of Frauds was not complied with, there was no remedy. But courts of equity would carry into effect an agreement void for not complying with the statute, when there had been sufficient performance of any obligation which would have arisen had the contract been valid. So that when one party does for another's benefit any act which he would not be supposed to do unless it was in fulfilment of some contract between the two, equity will not allow the party who has reaped the benefit to escape his liabilities under the agreement on the mere ground that he is not

bound, because the contract is not in writing as required by the statute.

In determining whether any specified act amounts to sufficient part performance of an alleged contract (which ought to be in writing, but is not), there are three tests to be applied to ascertain if it is such as will take the case out of the statute. These are (1) Is the act such as is not only referable to an agreement such as that alleged, but such as is referable to no other title? If the act might have been done with other views than those of performing the alleged contract, it will not take the case out of the statute. Thus, where a tenant in possession sued for the specific performance of an alleged contract for a lease, and set up his possession as an act of part performance, it was held not to be such, because his possession might be accounted for on other grounds than the agreement, *e.g.*, his character as a tenant. (*Wills v. Stradling*.) (2) Is the act merely introductory or ancillary to an agreement? If so, it does not constitute sufficient part performance. Thus, the delivering of an abstract of title, giving directions for conveyances, going to view the estate, making valuations, measuring the lands, and other acts of a like preliminary nature, are not sufficient part performance. (3) Is the act capable of being undone, leaving the parties in their original positions? If so, it is not a sufficient part performance. Thus, payment of a part, or even of the whole, of the purchase-money, will not take a case out of the statute. (Vide *Clinan v. Cooke*.)

On the subject of part performance, you should refer to some treatise on specific performance, and you will find a perusal of the recent case of *Alderson v. Maddison* instructive on the point.

IV. The Effect of the Contract on the Position of the Parties.

We propose to consider this subject under the following four heads:—

- (a) The position of the parties after the contract.
- (b) How this position is affected by the bankruptcy of either of them.
- (c) How this position is affected by the death of either of them.
- (d) The remedies for breach of the contract.

(a) *The Position of the Parties after the Contract.*

The immediate result of the contract is that the vendor becomes a trustee of the property for the purchaser, and the purchaser a trustee of the purchase-money for the vendor, subject to the obligation of the latter to show that he has a good title. (It is not, however, necessary that the vendor have a good title at the time of the contract, if he can procure one at any time before the time fixed for completion, provided he did not sell knowing that he had no title.) (See *Chamberlain v. Lee.*) Thus, then, the purchaser, being in equity the owner of the property, even before the conveyance has been made to him, is entitled on the one hand to any benefits that may accrue to the estate between the contract and the conveyance—such as an increase or improvement in the value of the land (*Harford v. Purrier*), and this even where the increase of value may have arisen through the expenditure of the vendor. (*Monro v. Taylor.*) But, on the other hand, the purchaser will have to sustain any loss or deterioration which results to the property between contract and conveyance. So that if a man contracts to buy a house, and before the conveyance of it to him it is burnt down, he will nevertheless have to fulfil his contract, and at the same time bear the loss. (*Paine v. Miller.*) And the recent case of *Rayner v. Preston* shows that in such a case the vendor may receive the insurance money where the house has been insured, and having received it, will be entitled to retain it as against the purchaser, and does not stand in the position of trustee of it for the purchaser; and though after payment of the purchase-money the vendor cannot retain the insurance, but must refund it to the insurance company, yet the purchaser has no claim to the money. (*Castellain v. Preston.*) The practical result of this is, that, acting for a purchaser, you should take care to see that the contract contains a clause that the benefit of any existing insurance should belong to the purchaser; or in default of this, to enter the name of the purchaser in the books of the insurance company as being interested in the premises insured.

The purchaser should always be cautious in taking possession of the premises before completion. He will not, it is true, make himself liable for “use and occupation” should the matter go off (*Winterbottom v. Ingham*), but the taking of possession may in some circumstances amount to a waiver of objections to the title. To

have this effect, however, the possession must be taken under such circumstances as reveal in the purchaser conduct inconsistent with an intention to insist on objections to the title. (See *Fleetwood v. Green.*)

(b) *The effect of Bankruptcy of one of the Parties.*

When a man becomes bankrupt all his property (which will include the benefit of any contract he may have entered into) will pass to his trustee. The result is that the trustee in bankruptcy of an insolvent vendor or purchaser will stand in his place and be entitled to enforce the contract; for the bankruptcy does not put an end to it. If then the vendor becomes bankrupt the trustee can compel the purchaser to pay the purchase-money and take a conveyance of the estate; and on the other hand (subject to a power the trustee has, and which we shall mention presently) the purchaser on tendering the purchase-money can require the trustee to complete the contract. And where the purchaser becomes bankrupt, the vendor (subject to the power of the trustee before mentioned) can require the trustee to take a conveyance, and will then be entitled to prove for the purchase-money owing, and in the same way, the purchaser's trustee on paying the purchase-money in full, can require the vendor to convey to him. The vendor has a lien on the estate and is not bound to relinquish it unless he gets payment in full. But the trustee in bankruptcy has a power which the purchaser or vendor, as the case may be, would not have had had he remained solvent; this is the power given by sect. 55 of the Bankruptcy Act, 1883, to disclaim an unprofitable contract. This he may do in writing, signed by him at any time within three months of the first appointment of a trustee, or, when he does not become aware of the contract within one month of such appointment, then within two months after the time he first becomes aware of it. The result of a disclaimer will in effect be to put an end to the contract, and any person injured by the disclaimer will be deemed a creditor to the extent of the injury, and may prove the same as a debt under the bankruptcy. The trustee may be forced to make a disclaimer in a shorter time than the three months above limited, by applying to him in writing and requiring him to decide whether he will disclaim or not. The trustee must then make his decision within twenty-eight days of receiving the application (or within such extended time as the court shall allow), or else he will be deemed to have adopted the contract.

(c) *The death of either Party.*

This will not put an end to the contract, but matters will stand in this position :—

(i) *Death of the Vendor.*

On this occurring his executors will be entitled to the purchase-money. As to the person who is to convey there is more difficulty. If he has died intestate the land will of course have passed to his heir; if he has made a will it will have vested in the devisee, in both cases of course still subject to the contract. If then the heir or devisee is at hand and under no disability and willing to execute the conveyance, the purchase-deed should be executed by him. But suppose such person cannot be found, is an infant, or will not convey; in such a case before the Conveyancing Act of 1881, it was necessary to bring an action for specific performance, for it was held that sect. 48 of the Land Transfer Act, 1875, which enables the personal representative of a bare trustee who dies intestate to convey the trust property, did not apply, because a vendor after contract was not a bare trustee within the section. (*Morgan v. Swansea Sanitary Authority.*) But now if a vendor dies before completion after 1881, it is provided by sect. 4 of the Conveyancing Act that his personal representative shall have power to convey the land to the purchaser. Consequently at the present time either the heir (or devisee) or the executor (or administrator) can now convey to the purchaser.

(ii) *Death of the Purchaser.*

If he dies intestate the right to have the land passes to his heir; if he makes a will the land, even if the contract for purchase be after the date of the will, passes to the devisee. The question now arises, will the heir or devisee be entitled to require the purchase-money to be paid out of the personal estate of the testator, or will he take the land subject to the liability to pay for it out of the estate. Formerly he could keep the land and require the personal representatives of the deceased purchaser to pay the price; but the effect of the various acts known as Locke King's Acts (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; and 40 & 41 Vict. c. 34) is that the heir or devisee will now take the land subject to and charged with the unpaid purchase-money (both when the land is freehold or copyhold, and when it is leasehold), unless there is

some contrary intention (in case of a devise) expressed by the testator. A general direction that the testator's debts shall be paid out of his personal estate will not amount to the expression of a "contrary intention." (30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.)

(d) *The Remedies for Breach of a Contract.*

Under this head we shall consider—(i) The remedy in damages; (ii) the remedy by way of specific performance. And, as arising in connexion with these—(iii) The time within which such remedies must be enforced; and (iv) the lien of the parties on the estate.

(i) *Damages.*—When a contract is broken by one party, the other may recover as damages all loss which may fairly and reasonably be considered as arising in the natural course of things from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time of making the contract, as the probable result of the breach. (See *Hadley v. Baxendale*.) Applying these principles to the breach of a contract to sell land, we shall find that in ordinary cases a purchaser is entitled to recover (1) the deposit he has paid, if any, and, in the absence of stipulation, interest thereon; (2) interest on the purchase-money, if it has been kept lying idle awaiting the completion, and if the vendor has notice of the fact; (3) expenses incurred in investigating the title, &c. Can he recover any further, or "consequential" damages? This question arose in the cases of *Flureau v. Thornhill*, *Hopkins v. Grazebrook*, and *Bain v. Fothergill*. The question in these cases was, Can the purchaser recover, as damages for the default of the vendor to convey to him, the loss of profit he sustains by reason of not being able to carry out some subsequent contract to sell the estate, which would result in pecuniary profit to him? The conclusion to be derived from the decisions is, that he will not be entitled to recover damages for the loss of his bargain, and this whether the breach occurs through a defect in the title or the vendor's wilful default to complete; unless the vendor at the time of entering into the contract knew of the resale at a profit, all the purchaser can claim is the money he has paid, with interest and expenses of investigating the title. As to the damages which a vendor can claim when the purchaser is the defaulter, he can only recover the loss actually sustained by the breach, *i.e.* the difference, if any, between the price agreed on and the market price of the property, as ascertained by a resale within a reasonable time, and

the expenses he has incurred. He is generally, under the conditions of sale, also entitled to the deposit which was paid on signing the contract. (See *Howe v. Smith*.)

(ii) *Specific performance*.—As a rule, the purchaser will only have recourse to an action for damages when the title to the estate is a bad one; for if he is desirous of obtaining the land, which it is to be presumed he will be when no exception can be taken to the title, his more appropriate remedy is an action to have the contract specifically performed, and to obtain a decree that the vendor shall convey to him. And as the court acts on the principle that the remedy should be mutual, it will specifically enforce the contract at the instance of the vendor, though his claim practically is to obtain payment of the purchase-money, and is only connected in a secondary manner with the land. On the same principle, it will not decree specific performance at the suit of an infant, because it would not decree such performance against him, and there is here a lack of that mutuality which the court requires. (*Adderly v. Dixon*, and *Flight v. Bolland*.) Specific performance of a contract to sell land will be enforced almost as a matter of course, for it is always difficult to say in such cases that damages would sufficiently compensate the disappointed party. Presuming that there is a valid contract, and even when the contract is not actionable, as not complying with the Statute of Frauds, but is taken out of that statute by sufficient acts of part-performance, the court will rarely refuse to grant specific performance of a contract to sell land. There are, however, many grounds on which cause may be shown why a decree should not be granted. Some of these grounds are:—Misrepresentation by the plaintiff; mistake rendering the performance a hardship, or some error which led the defendant into making the contract; some substantial misdescription by the plaintiff, but for which the defendant would not have contracted; the laches of the plaintiff in coming forward to claim his remedy; gross inadequacy of consideration; and many other reasons. (On the subject of specific performance generally, the reader is referred to *Fry on Specific Performance of Contracts*, or *Snell's Principles of Equity*.)

You should bear in mind that the court is not bound to grant specific performance, even where the plaintiff makes out his right to

it. It is expressly empowered by Lord Cairns's Act (21 & 22 Vict. c. 27) to award damages in an action, either in addition to or in lieu of specific performance. Several important points have been decided on the construction of this statute. For these in detail you must refer to some treatise on Equity. Suffice it here to observe that the principle of Lord Cairns' Act remains in force, notwithstanding the act has been repealed by the Statute Law Revision and Civil Procedure Act, 1883 (see 46 & 47 Vict. c. 49), and notwithstanding the Judicature Acts; indeed, these last acts have added further powers of granting damages to the court than those it possessed under Lord Cairns's Act, for it was held that under that act there was no power to give damages where the plaintiff did not make out his right to specific performance. (*Middleton v. Magnay*.) But now the court has power to grant damages, even where there is no case for specific performance. (See *Tamplin v. James*.) This case does not, however, seem to agree with *White v. Boby*, where it was said that damages in addition to or in substitution for specific performance will be given by virtue of the jurisdiction conferred by Lord Cairns's Act, only when the plaintiff has a case for specific performance.

An action for specific performance will lie to enforce an agreement for a lease, except in the case of a lease from year to year, or where the agreed term has expired or will expire before judgment can be obtained. (*Clayton v. Illingworth*, and *Nesbit v. Meyer*.) Moreover, a lease for more than three years in writing, but not by deed, and therefore void under 8 & 9 Vict. c. 106, is nevertheless good in equity as an agreement for a lease, and will be specifically enforced. (*Parker v. Taswell*.) Indeed, the agreement now, under the fusion effected by the Judicature Act, 1873, after entry by the tenant, answers all the purposes of the lease itself, and specific performance would not in a general way be required. (See *Walsh v. Lonsdale*.)

Before commencing an action on a contract to sell land, whether that action be for specific performance or for damages only, the purchaser must show that there is a valid contract, and in most cases, that he has tendered a conveyance to the vendor who has refused to execute it. (*Poole v. Hill*.) But he will be excused from tendering a conveyance when the vendor fails to deduce a title, produces a bad one, or wrongfully resells the property. In

the same way the vendor, before bringing an action, must prove that he has shown, or offered to show, a good title, and has been always willing and ready to execute a conveyance to the vendee in the terms of the contract. (*Poole v. Hill.*) It does not seem necessary actually to tender a conveyance, unless the contract provided that the vendor was to prepare it. It is usual, as you know, for the purchaser's solicitor to draw the conveyance.

(iii) *As to the Time within which the Remedies must be sought.*

By 21 Jac. 1, c. 16, s. 3, an action on a simple contract must be brought within six years next after the cause of such action shall have arisen, but allowance is made for certain disabilities by sect. 7, and in case of such disabilities, if they are existing at the time the right to bring the action accrues, a further period of six years will be allowed after the removal of the disability.

These disabilities (as modified by 19 & 20 Vict. c. 97, s. 10) are infancy and unsoundness of mind, and if the *defendant* is beyond the seas, the action may be brought within six years after he returns. (4 & 5 Anne, c. 16, s. 19.) Coverture was formerly a disability, but by the Married Women's Property Act, 1882, a married woman can sue as a *feme sole*, and so it would seem that it is no longer a disability.

The question now arises, When does the statute begin to run? The rule is, that the statute operates, not from the date of the contract, but from the time of the cause of action accruing. When then does the cause of action accrue in a contract to sell land? This will obviously be immediately upon the breach of the contract. When a time is fixed for completion, the breach will occur on default in conveying, or paying the purchase-money at that time, so that the statute will commence to run from the date of completion: but where no time is fixed for completion, it is more difficult to fix the period at which the statute begins to run. In the absence of stipulation the vendor has a reasonable time within which to make out his title; and the purchaser is not bound to pay the purchase-money until the title has been made out: so that the time from which the statute will run will obviously not be the date of the contract. Apparently the time will run as against the purchaser from a distinct refusal by the vendor to convey, or from some act or occurrence which renders it impossible for him to

convey. And as it is the duty of the purchaser to pay the purchase-money (presuming that a good title is made out) upon the tender of a proper and valid conveyance to him, the time will run against the vendor from that date.

It is important to remember that the statute does not extinguish the obligation under the contract, but merely takes away the remedy; so that a vendor's lien would not be destroyed although he might have lost his right to bring an action to recover the purchase-money. (*Spears v. Hartley.*) Again, the operation of the statute may be prevented and the obligation under the contract kept intact by three things: 1, an acknowledgment of the debt from which a promise to pay can be implied; 2, an unconditional promise to pay the debt; or, 3, a conditional promise to pay with evidence that the condition has been performed. (See *The River Steam Co. Case.*) The acknowledgment, however, to be sufficient must be in writing signed by the party to be charged or his agent duly authorized. (9 Geo. 4, c. 14, s. 1, and 19 & 20 Vict. c. 97, s. 13.)

We come now to enquire within what time an action for specific performance must be brought. The statute of James does not apply in these cases, but the rule in equity is that the party seeking relief must be active and energetic and guilty of no laches in coming forward to claim his remedy. The maxim is "*Vigilantibus non dormientibus subvenit equitas.*" So that, in seeking specific performance, the earliest opportunity should be taken of applying to the court for relief. Thus the lapse of time is one of the grounds on which the court will refuse to decree specific performance. (See *Mills v. Haywood.*) Thus in *Eads v. Williams*, where the plaintiff delayed three and a-half years in coming forward, that delay proved fatal to his claim to have his contract for a lease enforced. In *Southcombe v. The Bishop of Exeter* a delay of eighteen months was held to have the same effect. And where one party gives the other notice that he does not intend to perform the contract, a very brief delay by the other in bringing an action for specific performance will induce the court to refuse to make the decree. (See *Huxam v. Llewellyn.*) But to bar the plaintiff's right the delay must arise from his culpable or unwarrantable laches. So that where he is in possession of the property and has got the equitable estate, and the only object of the action is to obtain the legal estate, the vendor will not be allowed to avail

himself by way of defence of the plea that the plaintiff has been a long time in coming forward. For in such a case the plaintiff has not been sleeping on his rights, but relying on his equitable title without thinking it necessary to have his legal right perfected. (*Cartan v. Bury.*) And *à fortiori* when the delay is caused by the defendant, he cannot allege the delay as a defence. (*Ridgeway v. Morton.*) Again, the defendant may deprive himself of the right to allege the plaintiff's delay as a defence by a course of conduct which has led the plaintiff to make the delay, as where he has induced him to believe that he still means to carry out the contract. (See *Seton v. Slade.*)

(iv) *The Lien of the Parties on the Estate.*

At common law a lien is the right of a creditor to retain the property of his debtor till the debt is paid, and it ceases when the possession of that property is parted with to the debtor. But the peculiarity of an equitable lien is that it does not depend on the possession of the debtor's property, but, on the other hand, commences only when the possession of that property is parted with. Thus, on a sale of land, a vendor has a lien on the estate, though it is not in his possession, for the unpaid purchase-money. So a purchaser sometimes has a lien on the property in respect of the purchase-money he has paid.

Firstly. *As to the Vendor's Lien.*—When the vendor has conveyed the land to the purchaser without having received the purchase-money, or without having received the whole of it, he has a lien on the estate to the extent of the amount remaining unpaid. And this lien he may proceed to enforce by applying to the court either for a sale of the property, or even by an order restoring the possession of it to him. (*Williams v. Aylesbury Rail. Co.*)

Secondly. *As to the Purchaser's Lien.*—When he has paid the whole of his purchase-money, or a part of it, before the conveyance of the property to him, he has a lien to that extent on the land. As was said in *Rose v. Watson*, he acquires a lien exactly in the same way as if, upon payment of part of the purchase-money, the vendor had executed a mortgage to him of the estate to that extent; and this lien will extend to the case of a lease, so that an intended lessee, who has entered under the contract and expended money on the land, has a lien on it for the

money so expended in event of the lessor failing to grant a lease. (*Middleton v. Magnay*.)

The purchaser's lien extends to all instalments of the purchase-money paid with interest thereon, to sums paid under the contract as interest on the unpaid purchase-money, and the costs of an unsuccessful action for specific performance (if any) by the vendor against him.

Generally, we may remark, that a lien is not a very strong security, as it may be lost in various ways. It extends, however, against the estate in the hands of not only the person entitled to it and his heirs, and persons taking the estate from him as volunteers, but also in the hands of purchasers for value who have notice that the lien exists. And the trustee of a bankrupt will take subject to the lien although he has no notice. (*Ex parte Hanson*.) Again, the lien may be lost by negligence, as you may see by consulting the case of *Rice v. Rice*, or Snell's Equity, Chapter on Constructive Trusts. And, further, the person entitled may, in certain cases, be deemed to have abandoned his lien. The mere taking by the vendor of a security for the payment of the purchase-money will not have this effect, unless it can be construed into an expression of an intention to rely no longer on the estate, but on the purchaser's personal credit (*Macreth v. Simmonds*), so that he does not waive his lien by taking a bond or a bill or a promissory note, unless it appears that those instruments were accepted by him in substitution for the purchase-money.

Before concluding these remarks on contracts, we should add that under the Stamp Act of 1870, no agreement for the sale of land can be offered in evidence unless it has been previously stamped, and the act requires simple contracts (with a few exceptions which we need not mention here) to bear a 6*d.* stamp. This stamp must be affixed within fourteen days to all contracts, the subject-matter whereof is of the value of 5*l.* or more. After the fourteen days has expired, they can only be stamped upon paying a penalty of 10*l.*; but the Commissioners have power to remit the penalty, or any portion of it, if application with that object is made to them within twelve months after the execution of the instrument. To obtain a remission of the penalty some good cause

must be shown for the neglect to stamp, and the application should generally be supported by a statutory declaration setting out the facts which constitute a reasonable cause for the omission. And if the agreement happens to be produced in evidence in any court, and it be found to be unstamped or not sufficiently stamped, it cannot be received in evidence until the unpaid duty is discharged, the penalty of 10*l.*, and an additional penalty of 1*l.* paid to the officer of the court. When the contract is not contained in one document only, but has to be made out from several letters, it is sufficient to stamp one of the letters.

If several lots, each of the value of 5*l.* or upwards, have been bought at an auction, though the purchaser may sign only one agreement as to all the lots, yet the contract must be stamped with one 6*d.* stamp for each lot, for he is considered to have entered into as many agreements as there are lots. (*James v. Shore.*)

If the agreement is under seal (as it will have to be, for instance, when a corporation is a party to it) it must be stamped like a deed, that is, it will have to bear a 10*s.* stamp. (*Robinson v. Dryborough.*)

CHAPTER V.

THE ABSTRACT OF TITLE.

THE next step in the progress of the sale is for the vendor's solicitor to prepare the abstract of title. In drawing this you should bear in mind what we have said in a previous page as to what constitutes a perfect abstract, and as to the importance of furnishing the purchaser with such an abstract. At the risk of incurring the charge of repetition we will supplement the remarks we then made with an extract from Dart's Vendors and Purchasers as to the *test* of a perfect or sufficient abstract. "It must show," that authority says, "that the vendor is either himself competent to convey to, or able otherwise to procure to be vested in, the purchaser the legal and equitable estates of the property sold free from incumbrances." It is not necessary to show that he has the power to do so at the date of the delivery of the abstract if he can show that he will be in a position at the time fixed for completion to acquire and pass to the purchaser an indisputable right to the legal and equitable estates. (*Cattell v. Corral*.) If the abstract shows that there are any incumbrancers whose concurrence he cannot insist upon, then the abstract will be an imperfect one. (*Lewis v. Guest*.)

Mortgages and other incumbrances are considered in equity as mere matters of conveyance, *i. e.*, they will not render the abstract imperfect, because they still leave the vendor the power if he uses the necessary means to procure the legal estate. The incumbrancer can be called upon to join in the conveyance. And even where the incumbrances were not mentioned in the contract and no notice had been given of intention to pay them off, it was held that they do not constitute a defect in the title. (*Savory v. Underwood*.) If the vendor will be able to acquire a clear right to the legal and equitable estates before completion, it will not amount to

a defect in the title that the conveyance may be delayed by the fact that he has not those estates legally vested in himself and ready to be transferred to a purchaser. Thus in *Cattell v. Corral* (*supra*) a good title was held to be deduced where it appeared by the abstract that the vendor was a tenant in tail in possession and able to convey the estate in fee according to his contract by a deed enrolled. It seems to have been thought unnecessary that he should disentail the property before the time fixed for completion, and so put himself in possession of an estate in fee ready to be conveyed to the purchaser when the time arrived; but this seems an extreme case, for if the vendor died before the day of completion it is evident that the purchaser would lose the property, for the issue of a tenant in tail is not bound by the contract of his ancestor, unless, indeed, the contract was made in pursuance of the powers conferred by the Settled Land Act, 1882.

Bearing in mind, then, that it must be your object to prepare an abstract which shall be perfect in the sense of the word above explained, you will take care that it ultimately shows in the vendor at the worst a clear right to procure the conveyance of the legal as well as the equitable estate. And you will do well to bear in mind that a vendor who has entered into a contract to sell land knowing that he has no power to sell, and that he has no right to expect that he can acquire that power, will not be assisted by the court to maintain an action for specific performance. (*Chamberlain v. Lee.*)

As to what the abstract should contain we do not propose to discuss with any minuteness. What you ought to include in it will appear from the requisitions and objections on the title which the purchaser may make, and of which we intend to treat in a subsequent chapter; for it is a painful fact that most of the requisitions made by a purchaser's solicitor are such as he would never have had to make had the abstract been drawn with proper care and circumspection. It will be advisable, however, at this stage to lay before you a few general rules on the subject.

Even if it entails the necessity of abstracting a deed dated before the time limited by law or the contract as the commencement of the title, it will be well to commence with some deed which deals by way of conveyance with both the legal and

equitable estates. If, for instance, you begin with a will, you will, in the absence of stipulation, have to show that the testator was in possession at the time of his death. And, formerly, if you commenced with an appointment under a power, you would have had to have abstracted also the instrument creating the power to appoint, but in sales since 1881 this is unnecessary if the power is dated before the time stipulated or fixed by law for the commencement of the title. (Conveyancing Act, 1881, s. 3, sub-s. 3.)

You should abstract every deed and document which affects or has affected the property. Thus you should abstract a mortgage although there has been a reconveyance, for it is not for you to assume that the title has been brought back by the reconveyance to its original state; this is a matter which the purchaser is entitled to consider. Lord St. Leonards says, that "wherever the vendor's solicitor begins the root of the title he ought to abstract every subsequent deed," and it is advisable strictly to follow out his advice, and rather incur a comparatively small expense which a rather lengthy abstract may involve than run the risk of not only having to make subsequent costly amendments, but of delivering an imperfect abstract and giving the purchaser an excuse for withdrawing from the contract. Nor is this the only evil which the suppression of matters material to the title involves. You may thereby bring yourself within the grasp of the criminal law. For, by 22 & 23 Vict. c. 35, s. 24, a seller or his solicitor who conceals any instrument material to the title or any incumbrance from the purchaser or mortgagee, or who falsifies any pedigree on which the title may or does depend with intent to defraud is guilty of a misdemeanor, and also liable to an action for damages. Though this statute requires a fraudulent intent to be shewn, you must remember that there is no legal definition of fraud, and it is impossible to say what may or may not amount to fraud.

It is the vendor who bears the expense of the abstract, and formerly when property was sold in lots the purchaser was entitled to as many copies of the abstract as there were lots, and this even where the lots were held wholly or partially under a common title. But the Conveyancing Act, 1881, s. 3, sub-s. 7, provides that, when the lots are all parcel of a plot of land held by a single title, the purchaser shall not, except at his own expense, be entitled to more than one abstract of the common title.

What are the purchaser's rights as to the abstract? It seems that he is entitled to be furnished with one even though he has agreed to accept the title; it becomes his property in a qualified manner until completion, and if the sale is consummated it becomes his absolutely; but if the sale goes off he must return it to the vendor and must not even take a copy of it.

Acting as solicitor for the purchaser, your first business on receiving the abstract will be to give it a diligent and searching perusal. And it will perhaps stimulate your ardour (which in the examination of a voluminous and extremely dull abstract, is not liable to be over keen), if we remind you that your duty to your client binds you to use all reasonable care and skill, and that if through your negligence he acquires a faulty title you will be responsible to him in damages. The law does not go so far, however, as to compel you to take the property off your client's hands. (*British Investment Co. v. Cobbold.*)

In the verification of the title, there are two main points as to the object thereof to be kept in mind. The first object is to ascertain if the vendor from his own showing on the abstract has a good title, or at least such a title as he has contracted to sell. This object is to be attained by perusing the abstract with care, and bringing to bear on it all your knowledge of the law of real property. The second object is, presuming that the abstract shows a good title in the vendor, to ascertain that he can sufficiently prove the title as he sets it out in the abstract. This is to be ascertained by an examination of the deeds, documents, &c. abstracted, and such other proper evidence of facts, &c. stated, as may amount to clear evidence of the truth of his statement.

Our subject then may be divided into two parts—

- I. Treating of points of law affecting the goodness or otherwise of the title disclosed by the abstract.
- II. Points of law relating to the evidence by which that title is to be proved.

I. Points of Law affecting the Goodness or otherwise of the Abstract.

To discuss with any pretence to thoroughness and detail the innumerable points of law which the multifarious complications besetting a title may give rise to would fill many bulky volumes,

so various are the ways in which land may be dealt with, and so numerous the laws which regulate these dealings. All we can do is to endeavour to put before you shortly the principal points of law of which you will find a knowledge indispensable in the examination of an ordinary title. In cases of special complication it is never advisable for you to attempt to deal with the matter yourself, but for your own protection, as well as of that of your client, you should not hesitate to lay the abstract before counsel.

In years to come, when the law relating to the transfer of land is put on a permanent basis, and made more simple, as we think it can be made, the ancient laws relating to the conveyance of land will become matters of interest to the antiquarian alone; but at present it is absolutely necessary for the conveyancer to have a knowledge of the old methods by which estates were aliened and the laws which regulated title by alienation. For in investigating a title you may come upon an instrument purporting to convey an estate which is not the ordinary deed of grant used at the present day, and to understand its effect you will have to bring to bear upon it some acquaintance with the legal points concerning it. Thus you may find that one of the deeds appearing in an abstract is a feoffment. Before you can judge whether the feoffment is regular and valid and actually does what it purports to do, you would have to know the manner in which feoffments operated. Thus then, in the first place, we propose to bring to your notice a few points of law bearing on the old forms of conveyances which you are still likely to meet with in investigating a modern title.

Conveyances are divided into—1. Common Law Conveyances; and 2. Statutory Conveyances. The 1st class comprises (1) Feoffments; (2) Gifts; (3) Grants; (4) Bargains and Sales; (5) Leases; (6) Exchanges; (7) Partitions; (8) Releases; (9) Confirmations; (10) Surrenders; (11) Assignments; (12) Defeasances; (13) Disclaimers. The 2nd class comprises—(14) Covenants to stand seised; (15) Lease and Release; (16) Statutory Release; (17) Statutory Grant; (18) Appointments under Powers; (19) Assurances under the Fines and Recoveries Act; (20) Concise Conveyances under 8 & 9 Vict. cc. 119 & 124, and 25 & 26 Vict. c. 53.

In addition to these, however, a title by alienation may accrue by matter of record. Thus you may find that a man acquires his title by—(21) Private Act of Parliament; (22) By a Fine; (23) By

a Common Recovery. Again you may find he acquires his title by—(24) A Devise under a Will. Then again his title may accrue by the act of the parties, but not by their intentional act; thus it may depend on—(25) Occupancy (which includes (a) Adverse Possession; (b) Alluvion; (c) Dereliction; (d) Prescription); (26) Forfeiture. Lastly, a title may accrue by the act of the law independent of the parties themselves; as by—(27) Descent; (28) Escheat; (29) Curtesy, or (30) Dower. And in copyhold lands the title may depend on (31) Voluntary Grant and Admittance, Surrender and Admittance, Bargain and Sale and Admittance, or on a Customary Recovery.

(1) *Feoffments.*

As a feoffment is a method of conveyance which may still be made use of at the present day (as, for instance, on the conveyance of gavelkind lands by an infant), it is necessary that you should know something about it. It is a very old form of conveyance, and formerly needed nothing but the formal “livery of seisin” to perfect it. Writing, however, was rendered necessary by the Statute of Frauds, and by 8 & 9 Vict. c. 106, s. 3, a deed was made necessary, except in the case of an infant conveying by custom. Only freehold interests in possession could be conveyed by a feoffment, and to complete it proper words of donation and limitation had to be used and livery of seisin had to be made. There were two kinds of livery, livery in deed and livery in law: the first was the actual delivery of some symbol of possession of the land with apt words, the second a verbal delivery in sight of it. Livery in deed transferred the possession at once, but livery in law did not do so till the feoffee made actual entry. Again livery could only be made by a person who had actual possession at the moment of the livery, and only of corporeal hereditaments. It had also to be made to the freeholder himself, for, if made to a lessee for years, it was void and would not enure to a remainderman. Livery in deed might be given and received by attorney, but such was not the case with livery in law. We have already observed that a feoffment has now no tortious operation. (8 & 9 Vict. c. 106.)

(2) *Gifts.*

These conveyances were used to create estates tail, and differed from a feoffment only in the nature of the estate which passed

under them ; so that they required livery of seisin to render them effectual.

(3) *Grants.*

These were used in olden times to convey incorporeal hereditaments. A grant never had a tortious operation. Formerly, on the grant of a reversion or remainder, the grantee had to obtain the attornment of the tenant of the particular estate ; but 4 & 5 Anne, c. 3, made this unnecessary.

(4) *Bargains and Sales.*

A common law bargain and sale may still sometimes be made use of, as, for instance, by executors who have a power to sell. At law it did not operate to pass the fee ; but by the doctrines of the Court of Chancery the bargainor stood seised to the use of the bargainee who had paid his purchase-money, and when the Statute of Uses was passed the use was transferred into possession in the bargainee's hands. A common law bargain and sale did not require enrolment ; but one operating under the Statute of Uses does require it. (27 Hen. 8, c. 16.) This statute does not affect bargains and sales of real property for a term of years only.

(5) *Leases.*

Of these we shall speak in a future page.

(6) *Exchanges.*

An exchange is an arrangement by which two persons made mutual exchange of their property. To a valid common law exchange there were 5 requisites :—(a) The two subjects had to be of the same general nature, so that real estate could not be exchanged for personal, though real estate of one kind could be exchanged for real estate of another kind, *e. g.* socage lands might be exchanged for gavelkind lands (*Minet v. Leman*), corporeal for incorporeal hereditaments, land for a fee farm rent ; but the estates had to be of the same quality, so that freeholds could not be exchanged for copyholds or leaseholds, and *vice versa*. (b) The estates had to be of the same quantity of interest, so that an estate in fee could not be exchanged for an estate for life. (c) The word “exchange” had to be used. (d) Entry was necessary to give the exchange effect, so if either party died before entry his heir might

avoid the exchange. But no livery of seisin was necessary, even though the exchange was of a freehold estate. (e) By the Statute of Frauds the exchange had to be in writing; and now, by 8 & 9 Vict. c. 106, s. 3, it must be by deed. Exchanges may also be effected by application to the Land Commissioners under sect. 147 of the General Inclosure Act, 1845. Application in writing is to be made to them by the parties desirous of effecting an exchange, and the Commissioners, if they think the exchange would be beneficial, may make an order of exchange. A sealed copy will be given to each party, and the lands taken will be subject to the same uses, conditions, charges, encumbrances, &c. as the lands given in exchange. The person to apply for an exchange is the person in possession, unless he is merely a tenant for a term of less than fourteen years, or at a rent equal to two-thirds at least of the assessed value of the land. In that case the reversioner is the person to apply. If the person in possession is a lessee for any other term or at any other rent, then both he and the person in receipt of the rent reserved by the lease are the persons to make the application. (Sect. 16.) Notice of the proposed exchange must be advertised, and any person entitled to any estate in or charge upon the land proposed to be exchanged may give a notice of dissent, which will effectually prevent the exchange. (Sect. 150.) Copyholds may, with the consent of the lord of the manor, be exchanged for other land, and the land taken in exchange will either be held by copyhold tenure, or may, with the consent of all parties, be declared by the Commissioners to be freehold. (9 & 10 Vict. c. 70, s. 9; 10 & 11 Vict. c. 111, s. 6.) Note, too, that the Settled Land Act, 1882, empowers a person who is a tenant for life within that act (see *post*, Part IV. "Settlements") to exchange the settled lands. But he must give one month's prior notice to the trustees of the settlement and their solicitor; and he cannot exchange settled lands in England for lands out of England. He may accept money for equality of exchange; and in such case it will be paid to the trustees of the settlement, or into court, and will be applicable as "capital money" under the act. (See *post*, Part IV. "Settlements.")

(7) *Partitions.*

A partition may be resorted to when joint tenants, coparceners or tenants in common wish to sever their unity of possession.

Joint tenants always had power to make a voluntary partition by deed, except when their estate was for years only; but now, by 8 & 9 Vict. c. 106, s. 3, a deed is necessary in all cases. Coparceners can make partition by private agreement in four ways:— (1) Where they mutually agree as to the shares each shall take. (2) Where they agree to choose someone to divide the land, in which case they have choice according to seniority. (3) Where the eldest coparcener makes a division of the lands, in which case she chooses last. (4) Where the land is divided into shares and they were then assigned to each joint owner by lot. A deed is necessary by 8 & 9 Vict. c. 106, to complete a partition between coparceners and also between tenants in common.

Tenants for life can, under the Settled Land Act, 1882, effect a partition on making the same compliances with the statute as they would have to do in the case of an exchange under the act.

If any of the joint owners of the land refuses or is incapable of concurring in a partition, his concurrence may be obtained by an action in the Chancery Division. (*Agar v. Fairfax*.) But the court will not order a partition as a matter of course. For instance, it will not order it when the property is subject to a trust for sale (*Biggs v. Peacock*), as distinguished from a mere power of sale. (*Boyd v. Allen*.) Further, by the Partition Acts of 1860 and 1876, the court instead of ordering a partition may, in the interest of all parties concerned, or at the request of any party interested (and even though the others are ready to purchase his share, *Gilbart v. Smith*), may order a sale and division of the proceeds instead of a partition.

And it has no option, but must make the order for sale, if parties interested to the extent of one-half or more request a sale, unless it sees good reason to the contrary.

Partitions may also be made by applying to the Land Commissioners under the Enclosure Act, 1848, s. 13, in which case the partition will be carried into effect by an order of partition.

(8) Releases.

These were conveyances of an ulterior interest in lands to a particular tenant or of an undivided share therein to a co-tenant, or of the right to such lands and hereditaments to a person wrong-

fully in possession thereof. Livery of seisin was not necessary, as the releasee was in possession; but a deed was essential. Releases operated in five ways:—1. By way of enlarging an estate, *e. g.*, where a tenant in fee in remainder conveyed the remainder to the particular tenant. 2. By way of passing an estate, *e. g.*, where one of two coparceners released her right to the other. 3. By way of passing a right, as where a person who was disseised released his right to the disseisor. 4. By way of extinguishment, as where A., a tenant for life, leases to B. for life, remainder to C. and his heirs. Here, if the tenant in reversion released to B., it would extinguish his right to the reversion, which would enure to the advantage of C. 5. By way of entry and feoffment, as where there are two joint disseisors, and the person disseised releases to one of them. Here that one will be solely seised. The effect is the same as if the person disseised had entered, and afterwards enfeoffed that disseisor in fee. The only kind of release which you are likely to meet with in practice will be one operating by way of enlarging an estate, which occurs in the old method of conveyance by lease and release. (*Post*, p. 79.)

(9) *A Confirmation.*

This was a deed by which a conditional or voidable estate was made absolute and unavoidable. There had to be some precedent rightful estate or wrongful estate, to be confirmed in the possession of the person to whom the confirmation was made, so that a person who had only an *interesse termini* could not receive a confirmation until he had entered. And the preceding estate must not have been absolutely void, for “*Quod ab initio non valet in tractu temporis non convalescit.*”

(10) *Surrenders.*

A surrender was used to yield up a particular estate to the person who had the immediate reversion or remainder. To make the surrender good, seven requisites were necessary, viz.:—

- (a) The surrenderor must have a vested estate. So that a lease for years to commence at a future day cannot be surrendered. For the lessee has no vested interest, but only an *interesse termini*.
- (b) The estate of the surrenderor must be one that can merge in

the estate of the surrenderee. So that an estate tail cannot be surrendered, as it will not merge in the fee.

- (c) The estate of the surrenderor must be of a lower denomination than that of the surrenderee, or at least of the same denomination. So an estate for life cannot be surrendered to a person who has a mere term of years, but a tenant for his own life may surrender to another tenant for life.
- (d) The estate of the surrenderee must be the next estate in remainder or reversion, *i. e.* there must be no estate intervening between the two estates. Thus, if an estate is given to A. for life, remainder to B. in tail, remainder to C. in fee, A. cannot surrender to C., on account of the intervening estate which prevents a merger.
- (e) There must be privity of estate between the surrenderor and the surrenderee. Thus, if A. leases to B. for twenty years, and B. leases to C. for five years, C. cannot surrender to A.
- (f) The surrender must not be of part of an estate. So a lessee for five years cannot surrender three years and keep the other two years to himself.
- (g) By the Statute of Frauds, the surrender must always be in writing, and if it is of an interest required by law to be in writing, then by 8 & 9 Vict. c. 106, s. 4, it must be by deed.

(11) *Assignments.*

Of these we shall speak in a subsequent chapter.

(12) *Defeasances.*

A defeasance is a deed you are not likely to meet with, so we shall dismiss it by simply mentioning that it is a collateral deed by which on certain conditions an interest created by another deed may be defeated.

(13) *Disclaimers.*

A disclaimer, as you probably know, is a deed by which some grant, devise or bequest is renounced. It is most commonly used when trustees wish to decline to act in the trusts of some will or

deed. A person may disclaim an interest provided he has done no act showing his assent. We shall have occasion to refer further to disclaimers in a future chapter.

(14) *Covenants to stand Seised.*

This is a conveyance by which a person covenants that he will stand seised of lands to the use of his wife, parent, child or kinsman. The consideration of the covenant is natural love and affection. The covenantor is seised to the use of the covenantee; this use is, by the Statute of Uses, turned into the legal estate. You are not likely to meet with this kind of conveyance, so we shall dismiss it without further remark.

(15) *Lease and Release.*

This is a species of conveyance which you will constantly be meeting with in investigating titles, and which may be employed even at the present day: so that we will have to consider its nature a little more fully.

We have seen what a bargain and sale was; we have further seen that a bargain and sale operating by the common law did not require to be enrolled, but when the Statute of Uses was passed it was found that it had the following effect on bargains and sales. By the payment of the consideration the bargainor became seised to the use of the bargainee; the Statute of Uses said that he who had the use should be deemed in lawful seisin and possession of the land. Thus the bargainee, without the necessity of actual entry, became by virtue of that statute legally seised in fee in possession, and as a consequence thereof it became possible to make secret conveyances, a result which was considered very undesirable in those days. Consequently 27 Hen. 8, c. 16 was passed, which requires all bargains and sales of freeholds to be by deed enrolled within six months from their date, and thus it was hoped that publicity would be given to all transfers of land. But it was soon discovered that this statute did not apply to bargains and sales for a term of years, and that these, therefore, did not require enrolment. By making a lease then to a purchaser under a bargain and sale for a year, the lessee was placed in legal possession of the land without any public entry, which is necessary under a common law lease, and was in a position to receive a release of the reversion

in fee, and the final result was that he thus acquired a fee simple estate just as if he had been publicly enfeoffed. This method of conveying by means of a lease and release continued down to 1841, when an act was passed which provided that a release *expressed to be made in pursuance of the act* should answer the same purpose as a lease followed by a release answered before the act. (4 & 5 Vict. c. 21.)

(16) *Statutory Release.*

We have sufficiently discussed this under the preceding head.

(17) *Statutory Grant.*

This is the ordinary conveyance of the present day, and we shall have occasion to consider it fully later on.

(18) *Appointments under Powers.*

We have not the space at command to enter into any disquisition on the nature and mode of operation of appointments under powers, and it is a subject which belongs more properly to a book on the theoretical part of conveyancing. You will find full information on the subject in most of the ordinary text books on the Principles of the Law of Real Property. We shall content ourselves with pointing out that in executing an appointment under a power the forms which are required by the power must be rigorously followed out. You will remember that equity will sometimes aid to remedy the defective execution of powers, but it will only do so in favour of certain persons, and only when the defect is not of the essence of the power. (See *Tollett v. Tollett*, and Snell's Equity, Chapter on Accident.) The strictness of the common law on the point is now modified by two statutes: the first being the Wills Act, 1837, which provides that every will executed with the formalities therein prescribed for the execution of wills generally, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding the power shall have required some additional or other form of execution or other solemnity; the second being 22 & 23 Vict. c. 35, which, by sect. 12, provides that a deed executed in the presence of and attested by two witnesses in the manner in which deeds are ordinarily executed, shall, as far as the execution and attestation thereof, be a valid execution of a power

of appointment by deed or instrument in writing not testamentary, notwithstanding that the power names some special or additional mode of execution ; but this is not to operate so as to enable the consent of any person whose consent is made necessary to the execution of the power to be dispensed with. Note, too, that by 1 Wm. 4, c. 40, and 37 & 38 Vict. c. 37, the doctrine of illusory appointments is abolished. Further note that by the Wills Act, 1837, a general devise of the testator's real estate will pass any property over which he has a general power of appointment. And a general bequest of his personal estate will likewise pass personal property over which he has a general power of appointment, unless in both cases a contrary intention appear by the will. Again, the legal disabilities of coverture and infancy will not debar the donee of a power of appointment over personal property from exercising it by deed. (*D'Aubignan v. Andrews.*)

(19) *Assurances under the Fines and Recoveries Act.*

Of these we shall treat when we come to consider the cases in which the conveyances of married women must be acknowledged, and of disentailing deeds.

(20) *Concise Conveyances.*

Two statutes (8 & 9 Vict. cc. 119, s. 7, 124, s. 7; 25 & 26 Vict. c. 53) were passed with the object of introducing into use short statutory forms of conveyances and leases, but these enactments are practically dead letters, so that it is unnecessary to discuss them. We need only observe that the first named act was repealed by the Conveyancing Act, 1881.

(21) *Private Acts of Parliament.*

These are sometimes made use of when an estate is so fettered or is subject to latent claims in such a way that it is impossible to clear the title except with the aid of the supreme and uncontrovertible powers of Parliament.

(22) *Fines.*

Both fines and recoveries were abolished by the statute 3 & 4 Will. 4, c. 74, but as you may still sometimes meet with them in perusing an abstract of title, it will be necessary to say a few words

about them, but our remarks will be as brief as the complicated nature of the subject will permit. They were before 1833 the usual modes in which tenants in tail and married women conveyed their interests in lands.

Fines were fictitious actions commenced by the purchaser of lands against the vendor for the breach of an alleged contract to convey the land. The defendant acknowledged that the action was just (hence he was called the *cognizor* and the plaintiff the *cognissee*), and the matter was compromised by leave of the Court, and the land in question acknowledged to be the right of the plaintiff. The proceeding was called a *Fine*, because it puts an end to not only the action thus commenced but to all controversies respecting the same matter. In the reigns of Henry VII. and Elizabeth provision was made for the reading and proclamation of fines in open Court sixteen times, and for a list of all fines levied being duly published. If so proclaimed and levied, the rights not only of those who were *party* and *privy* to the fine but of all strangers were barred, unless they made claim within *five* years after the proclamation, or if under disability, *e.g.*, if they were infants, married women, persons non compotes mentis, or beyond the seas, within five years from the disability ceasing, or if their estate was in reversion within five years after the particular estate determined. By a statute passed in the present reign all fines are deemed to have been duly levied with proclamations. (See 11 & 12 Vict. c. 70, s. 1.)

In fines the five principal steps taken were :—

- (i) The issuing the writ of covenant and payment of the *primer fine*.
- (ii) The *licentia concordandi*, a step taken by the defendant to obtain the leave of the Court to agree (or compromise) the action. The leave was granted on payment of a fine known as the *king's silver*, or sometimes as the *post fine*.
- (iii) The giving of the *concord*, whereby generally the defendant acknowledged that the lands were the right of the plaintiff.
- (iv) The drawing up of the *note* of the fine, showing the parties, the parcels, and the agreement, which was duly enrolled.
- (v) Lastly came the *foot* or *conclusion* of the fine, showing the parties, day, year and place, and before whom it was acknowledged or levied.

Fines were of four kinds, viz. :

- (i) A fine *sur cognizance de droit come ceo que il ad de son don*.
This was the most usual as well as the surest kind of fine, as by it the defendant acknowledged a former feoffment by him to the plaintiff, and this acknowledgment operated instead of livery of seisin.
- (ii) A fine *sur cognizance de droit tantum*, which was an acknowledgment of the plaintiff's right merely, and occurred when the interest sought to be conveyed was of a reversionary nature.
- (iii) A fine *sur concessit*, whereby in order to end disputes, an estate *de novo*, usually for life or years, subject to a rent, was granted to the plaintiff.
- (iv) A fine *sur don, grant et render*, which comprehended fines Nos. (i) and (iii) before described.

Fines, then, you will bear in mind, were principally, though by no means exclusively, used to convey lands of married women and tenants in tail. As you will observe, they were of a very peculiar nature, and one of their peculiarities was that they bound married women notwithstanding their coverture; the husband, however, was a necessary party to the fine, and the wife had to be separately examined by the Court as to her voluntary consent to the proceedings. (This peculiarity also existed with regard to recoveries.) Tenants in tail by levying a fine turned the estate tail into a *base fee*—that is, the tenant barred the rights of his own issue, but not the rights of those in remainder and reversion, who, whenever the issue of the tenant in tail failed, had their right to enter on the lands if the estate tail in respect of which the fine had been levied was of an incorporeal hereditament or of a corporeal hereditament in remainder after an estate of freehold, or their right of action (called an action of *formedon*) if the estate tail was of a corporeal hereditament in possession.

(23) *Recoveries (more commonly called Common Recoveries).*

These resembled fines in that they were fictitious and collusive proceedings, but differed from *fines* since they supposed a suit not immediately compromised but carried on through every regular stage of proceeding. They were invented by the eccl-

siastics to evade the Mortmain Acts, but they were subsequently used mainly for the purpose of barring estates tail and turning such estates into estates in fee simple absolute. The first instance on record in which estates tail were allowed to be barred by a recovery is *Taltarum's case*, decided in the 12th year of Edward IV.'s reign.

Supposing the recovery was brought for the purpose of barring an estate tail; the plaintiff or demandant in the action was the real or supposed purchaser from the tenant in tail, who was made defendant. The purchaser alleged that the tenant in tail had no legal title, having succeeded a person who had turned the plaintiff out of the lands; the tenant in tail thereupon called on a person known as the common vouchee, (generally the crier of the court,) whom he stated to have warranted the title to him on his purchasing the lands; the common vouchee then appeared, and the demandant craved leave to imparl with him in private. The leave was always given, the demandant returning into court, but the vouchee making default and not returning; thereupon the court gave judgment for the demandant to recover the lands from the tenant in tail, and the tenant in tail to recover as recompense of or recovery in value lands of equal value from the vouchee. The sheriff then delivered the seisin of the lands to the demandant, who became seised for an estate in fee simple in possession by judgment of a court of record, free from any claim by the issue of the tenant in tail or by the remaindermen or reversioners. If the estate tail which it was desired to bar were in remainder only, the consent of the persons entitled to the estate preceding the estate tail had to be obtained by vouching them to warranty, and if they would not consent the recovery could not be suffered.

For full information on the subject of Fines and Recoveries, you should consult Vol. I. of Stephen's Commentaries.

(24) *A Devise.*

Of this we shall speak at length when treating of the subject of Wills.

(25) *Title by Occupancy.*

Occupancy, generally, is the taking possession of those things which theretofore belonged to nobody. With regard to real pro-

perty, there is only one instance of it, *i.e.*, where a tenant *pur autre vie* died during the lifetime of the *cestui que vie*, without having alienated his estate by act *inter viros*. The first person who entered on the lands could keep them during the *cestui que vie*'s life as *general occupant*, unless the grant had been made to the tenant *pur autre vie* and his heirs, for then the heir succeeded as *special* occupant. *Special* occupancy still occurs, when an estate *pur autre vie* is granted to a man and his heirs, and the tenant dies without a will; but *general* occupancy was abolished by the Statute of Frauds, which enabled the tenant to dispose of the estate by his will, and provided that if he did not do so, the estate should go to the heir, if he was named in the grant, and otherwise should go to the executor or administrator as assets. Further enactments of a similar nature are contained in the Wills Act, 1837.

As we stated, Occupancy includes titles by (a) Adverse Possession, (b) Alluvion, (c) Dereliction, and (d) Prescription. A few words as to each of these.

(a) *Adverse Possession.*

This was obtained in five ways—(i) By Abatement, *i.e.*, the wrongful entry by a stranger on the death of a person seised of an inheritance before the heir or devisee entered. (ii) By Disseisin, *i.e.*, the wrongful putting out of him who is seised of the freehold in actual possession. (iii) By Intrusion, *i.e.*; the wrongful entry by a stranger after the determination of a particular estate before the remainderman or reversioner entered. (iv) By Discontinuance. This formerly arose where a tenant in tail conveyed the lands to another in fee simple; the effect of which was to confer an estate in fee simple *by wrong* on the alienee, and operated as a *discontinuance* of the estate tail, and the issue had to pursue their remedy to recover the lands. But this cannot now occur, as by 8 & 9 Vict. c. 106, a feoffment has no tortious or wrongful operation. (v) By Deformement, *i.e.*, the holding of any lands to which another has a right.

The length of adverse possession which is necessary to give the person holding it an indefeasible right to the property is now regulated by the Statutes of Limitation (3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57). As a purchaser may be compelled to accept a title depending on the Statutes of Limitation (*Scott v. Nixon*; *Sands* to

Thompson v. Games v. Bonner), it will be necessary for you to know the provisions of these two statutes. To attempt to set them out would be impossible within the limits which we have at command, and you must refer to the statutes themselves for information.

(b) *Alluvion.*

A title to land may be gained by alluvion, *i.e.*, by the washing up of land by the sea, or the waters of a river. Thus, if the alluvion is sudden and considerable, and is caused by the sea, the land washed up belongs to the crown; but if otherwise, it belongs to the owner of the lands adjoining, for the maxim is, *De minimis non curat lex*. And if an island arises in the middle of a river, it belongs equally to the owners of the opposite shores; but if it is nearer one bank than another, it belongs to the proprietor of the bank which is nearest to it.

(c) *Dereliction.*

Dereliction, *i.e.*, the receding of water leaving the land high and dry. The same rules as apply to alluvion apply equally to dereliction.

(d) *Prescription.*

Prescription is the title acquired to an incorporeal hereditament by mere usage on the part of some person or his ancestors, or of those whose estate he has. At common law, the right to claim an incorporeal hereditament by virtue of long user of it could be defeated if it could be shown that that user commenced at any time subsequent to the reign of Richard I., though there was a presumption that after twenty years' enjoyment of the right it had been enjoyed from time immemorial. Claims to profits *à prendre*, easements and other like rights are now regulated by statute, *viz.*, by the Prescription Act (2 & 3 Will. 4, c. 71), which briefly makes the following provisions on the subject:—

- (1) Claims to rights of common and other profits *à prendre* are not to be defeated after thirty years' enjoyment by showing that the right was first enjoyed at any time prior to such period of thirty years; when the right has been enjoyed for sixty years it will be indefeasible unless had by consent or agreement.

- (2) Similar provisions are made as to rights of a way and water, except that the periods are twenty and forty years respectively.
- (3) A right to light is to be indefeasible after twenty years' uninterrupted enjoyment, unless it has been with consent in writing.
- (4) The periods are to be counted back from the commencement of any action questioning the right, and no act is to be deemed an interruption unless acquiesced in for one year after notice.
- (5) Time will not run in cases of disabilities, such as infancy, lunacy, tenancy for life, or during action pending, except where the right is declared to be indefeasible.

Where any land over which an easement has been enjoyed is held for a term for life, or exceeding three years, the time of such enjoyment during such term is to be excluded in computing the period of forty years in case the claim to such easement be (within the three years next after the end of such term) resisted by the person entitled to the reversion.

(26) *Forfeiture.*

Title may still accrue by forfeiture, though the abolition of forfeiture for felony by 33 & 34 Vict. c. 23, has taken away one of the chief cases in which forfeiture occurred. Thus lands may still be forfeited by alienation of them contrary to law, as where they are alienated in mortmain, *i. e.* to a corporation which has no licence to hold land. In such a case the land is forfeited to the lord of the fee. Again, the right to present to a living may be lost by the neglect of the patron to present in certain cases; and when the presentation has finally lapsed to the crown, the patron loses all his rights with regard to that particular presentation. And the right of presentation may also be forfeited for simony and vested *pro hac vice* in the crown. Again, forfeiture may take place by the neglect to perform certain conditions upon which an estate is held. This used most frequently to occur under leases when the rent limited therein or the covenants and conditions contained therein were not paid, observed and performed; but, as we shall see later on, the liability to forfeiture on this ground has

been very considerably curtailed by the Conveyancing Act, 1881. Breaches in the observance of copyhold customs are a fruitful source of forfeiture. Thus every alienation contrary to the nature of the customary tenure is a ground of forfeiture to the lord of the manor. So also is waste, voluntary or permissive, which is not warranted by the custom of the manor; so also are the refusal to perform the services, to pay the fines or rents. And when copyholds are descendible and are not devised, the heir is bound to come forward on the death of his ancestor and require to be admitted. If he does not do so within the time prescribed by custom certain proclamations are made, and if he does not appear immediately after the last proclamation the lord may seize the land as forfeited. In some manors the lord can only seize *quousque*, i.e. until some person claims to be admitted. Protection is afforded by statute to infants, married women, lunatics and idiots, entitled to admittance, in consequence of their inability to appear. They are authorized to appear either in person or by their guardian, attorney or committee, and in default of such appearance the lord or his steward may appoint any fit person to be attorney for that purpose only, and by such attorney to admit the person under disability and impose the proper fine. Provisions are made for securing the payment of the fines, and it is provided that no absolute forfeiture of the lands shall be incurred by the neglect of a person under such disabilities to come in and be admitted, or for their omission, denial or refusal to pay the fines due on admittance. (11 Geo. 4 & 1 Will. 4, c. 65, and 16 & 17 Vict. c. 70.)

(27) *Descent.*

The law of descent is now regulated by the Inheritance Act of 1833, 3 & 4 Will. 4, c. 106. This statute does not apply to descents which took place before the 1st January, 1834, so that if while investigating an abstract you find that the title depends on a descent which took place before that date, you must apply to it the old canons of descent. These you will find tabulated in Blackstone's Commentaries or in Stephen's Commentaries, Vol. I. The law as to descents which take place after that date is contained in the Inheritance Act, to which you are referred, and an additional provision is made by 22 & 23 Vict. c. 35, ss. 19, 20, the object of which was to prevent escheats.

(28) *Escheat.*

In consequence of the provisions of the last-mentioned statute and of 33 & 34 Vict. c. 23, which abolished all escheat for treason, felony and *felo de se*, escheats will so seldom occur at the present day, and they have occurred so seldom within times which you are likely to extend your investigations to in examining an abstract, that it seems desirable to pass this subject by with a bare reference to it. In Stephen's Commentaries, Book II., Pt. I., Ch. XII., you will find all the learning on the point. We may, however, mention in connection with the law of escheat the provisions of the Intestates Act, 1884, under which an escheat may occur in cases where before the act there was no escheat. The fourth section of this act provides that when a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest whether *legal* or *equitable*, in any *incorporeal* hereditament, or of any *equitable estate or interest* in any *corporeal* hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments.

(29) *Dower.*

The widow's right to dower will be no incumbrance upon the title except in those cases where she was married to the vendor or someone through whom he claims, before 1834. For, by 3 & 4 Will. 4, c. 105, the husband's conveyance will defeat the right of his wife to dower, and it may also be defeated by a mere declaration in any deed or in his will that she shall not be entitled to it. But whenever you find that the property has passed through the hands of a person who was married before 1834, you should make the enquiry if his wife or widow is still alive, and if she is, require her to join in the conveyance so as to release her right to dower. This we will treat of when we come to speak of purchase deeds. The wife may, of course, have already barred her rights; this she may have done by a fine levied or a recovery suffered by the wife, or by a deed acknowledged under the Fines and Recoveries Act. Or she may have accepted a jointure in lieu of dower; in order to bar the dower effectually the jointure must, under the provisions

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of the Statute of Uses (27 Hen. 8, c. 10), have the following requisites:—1. It must take effect immediately on the husband's death; 2. It must be for her own life at least; 3. It must be made to the wife herself; 4. It must be made in satisfaction of her whole dower; 5. It must be made before marriage. Again, the right to dower was formerly lost if the husband was convicted of treason, but this cannot now happen, as forfeiture for treason is abolished by 33 & 34 Vict. c. 23. Dower is also forfeited if the husband is divorced from his wife (*Stephen v. Frampton*), but it will not be lost by a mere judicial separation. Bear in mind, too, that the old common law dower does not attach to equitable estates or to legal estates unless it is an estate of inheritance and the husband was solely seised at some time during the coverture, and issue which the wife might have had might have inherited. Nor will it attach when the land has been conveyed to the husband by the usual uses to bar dower. The statutory dower, on the other hand, attaches to equitable as well as legal estates.

(30) *Curtesy.*

This can scarcely be called an incumbrance, for if it exists at all it must be an estate in possession, and it is not a right like dower, which may lie hid and then spring up to discomfort a purchaser. For there is no curtesy until the wife is actually dead, and if she conveys away the land during her lifetime the curtesy has never attached. It may be useful, however, to remind you in what cases curtesy attaches. When the husband survives the wife, he will, in case he has had issue by her born alive capable of inheriting the estate as her heir, become entitled to an estate for the residue of his life in such lands of his wife as she was solely and actually seised of in fee or in tail in possession, whether the estate is legal or equitable; but the estate must not be a joint one, and, except in gavelkind lands, he must have had issue by his wife born alive and capable of inheriting. The curtesy attaches to equitable estates (*Casborne v. Scarfe* and *Eager v. Furnival*), and it will apparently still attach to legal estates, notwithstanding the Married Women's Property Act, 1882. However, with regard to property settled on the woman for her separate use or which comes to her under the Act of 1882, the curtesy will only attach if the woman dies intestate as to the property.

In cases of copyhold lands you should make an inquiry as to what is the custom as to freebench and curtesy, as they differ in different manors according to the custom of the manor.

(31) *Copyhold Assurances.*

(a) *Voluntary Grants.*—When the lands come into the hands of the lord of the manor by forfeiture or some other means, he may either retain them or make a regrant of them to some fresh tenant; and he may make a regrant even although he be under some disability, such as infancy, lunacy or the like; for he grants not in his personal capacity but in his official status as “*Dominus pro tempore*” of the manor. The land when regranted will be held by the tenant subject to the custom of the manor. (b) *Surrender and admittance.*—Of this we shall speak when we come to deal with the modes by which copyholds are transferred to a purchaser. (c) *Bargain and sale.*—This mode of conveyance is sometimes adopted in the transferring of customary freeholds; but as the fee always remains in the lord, admittance is necessary to perfect the assurance. (See *Duke of Portland v. Hill.*) (d) *Customary recovery.*—This was a proceeding by which, before the Fines and Recoveries Act, estates tail in copyholds were barred; they were analogous to the proceedings by recovery adopted to bar estates tail in freeholds; and it seems they are still necessary with regard to customary freeholds, since 3 & 4 Will. 4, c. 74, while it provides means for barring estates tail in copyholds, does not provide means for barring such estates in customary freeholds.

II. Points of Law relating to the Evidence by which the Title abstracted is proved.

We will now presume that you have diligently perused the abstract, and have found that it apparently deduces a good title in the vendor. Your next concern is the evidence of the title as deduced. The first point on which you will naturally want to satisfy yourself is, Do the deeds, documents, &c. abstracted exist? The second point will be, presuming that they do exist, Are they genuine and valid? These two points will involve the question,

What evidence of the existence of various kinds of deeds, documents, &c., are you entitled to require, and what proof that they have been attended with the necessary formalities to make them legally valid and effectual? A third point will be, What evidence are you entitled to demand of matters of fact stated and of proceedings alleged to have been taken in courts of law? Under this head you will have to consider what facts, &c. you are required by law to take for granted, and when direct proof cannot be furnished, how far you will be safe in presuming the existence or non-existence of a state of affairs or of persons as alleged in the abstract.

So numerous and diversified are the requisitions upon title which the ever-varying circumstances attending titles render it possible for you to make, that it is almost impossible in any general dissertation on requisitions to give you any clear idea of the evidence, &c. you should ask for in any particular case. The circumstances of each special case and the peculiarities of any special title which happen to be before you alone must be the guide as to what requisitions you should send in to the vendor; all we can do is to attempt to lay before you a general view of the nature of the proof which you are entitled to and ought to require in ordinary and in some few special cases. The variety of possible requisitions further makes it all but impossible to classify them; and the best attempt we can make in this direction is to consider the subject under the following heads:—

1. How far is the general right to call for strict proof precluded or limited by contract, statute, or the law as laid down by the courts?
2. What evidence of the execution, attestation, perfection, and generally of the validity of deeds, documents, &c. ought to be required by you?
3. What proof of matters of fact are you entitled to?
4. What proof should you demand of proceedings in courts of law which the abstract alleges?
5. What general requisitions should you make and what general points should you pay attention to in framing your enquiries and objections to the title?

We shall then as a sixth division consider (6) waiver of objections to the title, and then treat of (7) the production of the title deeds.

If we endeavour to give you some information under each of these heads, we opine that, although we may not happen to furnish you with a requisition which may be applicable to a particular title you may chance to be investigating, we may yet show you in what spirit and with what care and circumspection your enquiries should be made.

(1) *How far is the General Right to call for Strict Proof precluded, &c. ?*

(a) If you have entered into a contract the terms of which restrict your full right to call for complete and satisfactory evidence of the vendor's title, you will of course be bound by it, and cannot persist in demanding proofs which you have contracted not to demand. The purchaser who has entered into a contract containing restrictive stipulations of this description must be taken to have duly weighed how much they detracted from the value of what he was purchasing, and to have proportioned the price he contracted to pay accordingly. Thus if the contract provides that the title shall commence with a specified deed, and it is stipulated that he shall not make any enquiry, objection or requisition in respect to the title prior to that deed, he will be bound by the condition, and will not be at liberty to enquire into the prior title or to object to it unless he finds some flaw in it from information received from some other quarter than the vendor. (See *Smith v. Robinson*.) But at the same time, as we have already mentioned, a vendor may not have recourse to such a stipulation in order that the purchaser may be precluded from objecting to a defect which he (the vendor) knows to exist in the prior title, and a general condition so worded as to cover a known defect which is not mentioned cannot be enforced. (*Edwards v. Wickwar*.) As we have stated, the vendor's only safe course, when there is a defect in his title, is clearly to state its nature, and then provide that no objection shall be made on account thereof.

A recent case (*Re Gloag and Miller's Contract*) shows that even where the contract is silent as to the title to be shown, the legal implication that the purchaser is entitled to a good title may be

rebutted by evidence that before the execution of the contract he had notice of defects in the vendor's title; but if the contract expressly provides that a good title shall be shown, then the case is otherwise.

(b) In the absence of a contract, or if there is one, subject to the terms thereof, your strict rights in verifying the abstract are curtailed by statutory enactment.

(i) The length of title you can now require is cut down to forty years by the Vendor and Purchaser Act, 1874.

(ii) Sect. 3 (3) of the Conveyancing Act, 1881, provides that you shall not require the production or any abstract or copy of any deed, will or other document dated or made before the time prescribed by law or stipulated for the commencement of the title, even though the same creates a power subsequently exercised by an instrument appearing in the abstract; and from requiring any information or making any requisition, objection or enquiry with respect to any such deed, &c. or title prior to that time, notwithstanding that such deed, &c. or that prior title is recited, covenanted to be produced or noticed; and further, it requires you to assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed, &c. forming part of that prior title are correct and give all the material contents of the recited deed, &c., and that every document so recited was duly executed by all necessary parties and perfected if and as required by fine, recovery, acknowledgment or otherwise.

(iii) By the Vendor and Purchaser Act, 1874, recitals of statements and descriptions of facts, matters and parties contained in deeds, instruments, acts of parliament or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions. It has been held under this act that where a deed twenty years old contained a recital that the vendor was seised in fee, that was a good root of title, and a forty years' title could not be required. (*Bolton v. London School Board.*)

(iv) By the joint effect of the Vendor and Purchaser Act, 1874, s. 2, subs. 1, and the Conveyancing Act, s. 3, subs. 1, under a contract to grant, sell or assign a term of years, derived or to be derived out of a freehold or leasehold estate, the intended lessee or

assign is precluded from calling for the title to the freehold or leasehold reversion. The statute last mentioned does not contain the word "grant," so that it does not apply to the case of the creation by a lessee of an underlease, but only to the assignment of an already existing term with a leasehold reversion. By sect. 13 of the Act of 1881, however, on the grant of a lease to be derived out of a leasehold interest with a leasehold reversion, the intending lessee cannot call for the title to the leasehold reversion.

Consequently if A., the tenant in fee simple of freehold lands, agrees under an open contract to lease the lands to B. for fifty years, B. cannot, owing to the Vendor and Purchaser Act, 1874, call for any title at all, though he takes subject to A.'s title. (See *Patman v. Harland*, where a lessee was held bound by a restrictive covenant entered into by his lessor the freeholder, on the ground that though he had no actual notice of the covenant, yet he had constructive notice of it, since, had he stipulated to look at A.'s title, as he might have done, he would have obtained actual notice.)

Again, if B., in the case supposed, agreed to sell his lease to C., C. could not call for A.'s title, this being the freehold reversion, and so protected by the Vendor and Purchaser Act, 1874; but he could for the lease itself.

Again, if C. agreed to grant an underlease to D. for twenty-five years, while D. could call for the production of the lease he could not call for A.'s title, for this is the freehold reversion, and so protected by the Act of 1874.

Again, if D. agreed to sell the underlease to E., E. could only call for the production of the underlease made by C. in favour of D. He could not call for the lease in C.'s hands, for this is the leasehold reversion, protected by sect. 3 of the Conveyancing Act, 1881, nor could he call for A.'s title to the freehold. (Vendor and Purchaser Act, 1874.) Once more, if E. agreed to grant F. an underlease for ten years, F. could call for E.'s underlease, since, as shown above, no provision has been made to take away this right of F.; but he could not call for D.'s title, for this is the leasehold reversion, and protected by sect. 13 of the Conveyancing Act, 1881.

(v) By sect. 4 of the Conveyancing Act, 1882, where a lease is made under a power contained in a settlement, will, act of parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intending assign, form part of the title, or evidence of the title, to the lease.

(vi) By the Conveyancing Act, 1881, s. 3 (4), when land sold is held by lease (not including underlease), the purchaser must assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent before completion, must also assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to completion. And, by sub-s. 5, a similar provision is applied to the sale of an underlease, and the purchaser is required to assume that the underlease and every superior lease were duly granted, and on production of the last receipt for rent due under the underlease he must assume that all the covenants of the underlease, and the rent and covenants of every superior lease, have been paid and duly performed up to completion. These subsections, however, will not apply when the rent limited is a peppercorn rent. (*Moody & Yates' Contract.*)

(vii) By the Conveyancing Act, 1881, s. 55, in deeds executed after 1881, a receipt for the consideration in the body of the deed, or indorsed thereon, will, in favour of a purchaser not having notice that the consideration has not in fact been paid, be sufficient evidence of the payment thereof. As to receipts in deeds not within this act, it has been held that neither the receipt in the body of the deed, nor the one indorsed, prevented the person who acknowledged the receipt from showing that the money was not paid; but the rule is, that where you find both receipts in the usual form you are not obliged to enquire further, and will be safe in abstaining from requiring evidence of the actual payment of the consideration.

(c) In many cases in which the vendor has been unable to supply strict legal proof of the existence of documents, or of their due execution and regularity, or of the existence or non-existence of certain states of facts, or of identity of the parcels, or of persons, &c., courts of law and equity have applied the doctrine of presumption, and required the purchaser to be content with inferior species of proof, or to take for granted that under the peculiar circumstances of the case the state of matters is as the vendor alleges them to be, or has insisted on his presuming a condition of affairs which is favourable to the title. Thus, as to the due existence and due execution of deeds, and generally of all instruments, it has been established as a general principle, that when a right which must have had its origin by virtue of a deed or other instrument has been

enjoyed for a considerable length of time, and such deed, &c. cannot be produced, it is nevertheless to be presumed that the right enjoyed was regularly and legally created, unless there is something to negative the presumption. (*Lyon v. Reade.*) Thus, in *Hillary v. Waller*, a re-conveyance of the legal estate was presumed from trustees in a case where the property had been dealt with for 110 years without reference to the fact that it was outstanding. Again, in *Cooke v. Soltan*, payment of a mortgage debt and re-conveyance of the legal estate was presumed, an interval of eighty years having elapsed, and the mortgage not having been mentioned subsequently in the title deeds, and the deeds having been in the vendor's possession for twenty-five years without any claim for interest or principal; and in another case payment of the purchase-money was presumed after the lapse of forty years. (*Bidlake v. Arundel.*) Another kind of presumption is, that the formalities requisite to a deed have been duly observed; thus, if a deed showing the signature of the person conveying it is produced, the sealing and delivery of it will be presumed; and generally a deed produced from the proper custody will, after thirty years, be required to be admitted without any proof of execution at all. Livery of seisin in the case of a feoffment will be presumed after twelve years' consistent possession thereunder; and there will be a presumption that an instrument duly executed, which is lost, was also duly stamped. (*Hart v. Hart.*) But these remarks must be received subject to the reservation that there will be no presumption that prescribed formalities have been complied with, when the law has specially prescribed them on the grounds of general policy. Thus, no presumption will arise as to the due enrolment of a deed specially required by some statute to be enrolled. (See *Doe v. Waterton.*) In the same way, when strict evidence cannot be adduced as to matters of fact, the vendor will be allowed the benefit of the doctrine of presumptions. Thus, when the actual seisin of a testator cannot be proved, it will be presumed from facts which show that he acted as owner of the property, *e. g.* by the production of leases granted by him, &c.; and the difficulty of proving that a man died intestate is met by allowing the fact to be presumed on the production of letters of administration. Again, children born in wedlock are presumed to be the children of the husband, though they may be born the very

day after the marriage; and the fact of a marriage being proved, the law presumes that all circumstances existed necessary to make it a valid one. A presumption, too, may arise in favour of the death of a party after the lapse of many years since he was last heard of; but the general rule that a person who has been unheard of for seven years is to be considered as dead (*Nepean v. Doe*), does not seem to apply as between vendor and purchaser, and to raise the presumption the particular circumstances of each case must be considered. Presumptions will also sometimes be raised that females of an advanced age are past the age of childbearing. Thus it has been presumed that a woman of fifty-eight and unmarried was one who was not likely to have any issue. (*Miles v. Knight*; and see *Re Widdo*.) But if the woman is married, unless she has been married for a very long time without having had children (*Re Millner*), the court will not treat her as past childbearing, even though she be more than fifty-four years of age, as where she has only been married three years. (*Croxtan v. May*.)

(2). *What Evidence of the Execution, Attestation, Perfection, and generally of the Validity of the Deeds, &c. abstracted, ought to be required?*

We now come to speak of the proof you should require of deeds, documents, &c. You must bear in mind that all our subsequent remarks are made subject to the provisions of the Vendor and Purchaser Act, 1874, and the Conveyancing Act, 1881, as to proof by recitals, and that the proofs, which we now mention as being such as you are entitled to, can only be required by you when those statutes do not apply, and when the contract under which you have purchased is silent on the point.

(a) *As to Proof of Deeds generally.*—The mere production of these, however recent they may be, is generally deemed sufficient. In strictness you are entitled to have the due execution proved by the attesting witness, but this is seldom insisted on unless there are suspicious circumstances attending the execution. Deeds thirty years old prove themselves, provided they come from the hands of the proper party, and possession has been held con-

sistently with their provisions. (*Doe v. Wooley.*) This rule applies not only to deeds, but to bonds, receipts, letters, &c. But even in the case of deeds thirty years old, if there are any erasures or interlineations you are entitled to have the deed fully proved, and the blemishes explained. For if these are in a material portion of the deed they make the deed void. (*Piggot's Case.*) A mere immaterial alteration, however, will not now affect the validity of a deed; and the presumption is that all alterations in deeds were made before execution. When you find erasures or interlineations you should look at the attestation clause to see if they are there noticed, and if they are not you should make inquiries. (See *Fitzgerald v. Fauconberg.*) When a deed requires registration (as it does when it conveys land in Middlesex or Yorkshire (including Kingston-on-Hull), under the several statutes relating thereto) it should be seen that there is indorsed on the deed a memorandum signed by the deputy registrar, this being evidence of its due registration. If no memorandum is indorsed, then a search must be made in the registry. You are not bound, with regard to lands in Middlesex, to make this search, and will not be affected by any prior incumbrance, even though it be duly registered, if you have not notice of it; but as to lands in Yorkshire the Registry Act, 1884, has provided that mere registration shall be sufficient without notice; and, therefore, whether you search or not, with regard to lands in Yorkshire, you are deemed to have notice of all conveyances, &c. registered affecting the lands; and as to lands in Middlesex, though you are not bound to search, yet if you do search, you will be deemed to have notice of every document registered during the period through which you extend your search. (*Hodgson v. Dean.*) You should be particular in looking at the stamps on the documents to see that they are sufficient in amount. If they are not, you should require the vendor to stamp them properly.

If the deed has been executed under a power of attorney, you should see that the power (which must be under seal) is produced to you. It is not usual to ask for evidence of the execution of the power, but as the donor's death revokes it, you should require proof that he was alive at the time it was acted upon. Such proof might consist in the production of a certificate of the death of the donor, showing him to have died subsequent to the execution of

the deed. There will be a presumption that the power was not expressly revoked, unless the contrary be shown. These observations are, however, now subject to the provisions of the Conveyancing Act, 1882, which by sect. 8 provides, that if a power of attorney is given for valuable consideration, and is in the instrument creating it expressed to be irrevocable, then, in favour of a purchaser, the power cannot be revoked either expressly or by the donor's death, marriage, lunacy, unsoundness of mind or bankruptcy, but the donee may act in spite of such occurrences. And further, the purchaser is not to be prejudicially affected by notice of an express revocation, or of facts which would otherwise constitute an implied one. The act only applies to powers created after 1882. Sect. 9 of the same act provides, that if a power of attorney (created after 1882), whether given for valuable consideration or not, is by the instrument creating it expressed to be irrevocable for a fixed time not exceeding a year from the making thereof, then in the favour of a purchaser the power is irrevocable, either expressly or impliedly, during that fixed time, and the donee may do any act under it during that fixed time, notwithstanding anything amounting to revocation; nor will notice of express revocation or of the donor's death, marriage, &c., prejudice the purchaser or the donee. The donee of a power of attorney ought to exercise it not in his own but in the donor's name, and formerly if he used his own name only, he, and not his principal, would be bound; but a change is effected in this rule by sect. 46 of the Conveyancing Act, 1881 (and which applies to powers created by instruments dated either before or after the commencement of the act). This section enables the donee to execute the power in his own name if he thinks fit, and the power so executed will be binding on the donor. Again, by sect. 47 of the same act, any person making a payment or doing an act in good faith under a power of attorney is exempted from liability in case the power has been either expressly or impliedly revoked, if he had no notice of such revocation. The section only applies to payments and acts made or done after 1882. Provisions are also made for the deposit in the Supreme Court of powers of attorney, but these we shall examine later on. You will then bear these points in mind when you come across a deed which has been executed under a power of attorney. When a deed is not produced, and its loss is set up as

the reason for non-production, you are entitled to proof of its execution, and to evidence of its contents. An attested copy is often received ; but you should also insist on having some evidence of the alleged loss, and also that diligent search has been made for it. If you accept a copy as evidence, take care that it is a copy of the original. A copy of a copy is not evidence. Of deeds required by law to be enrolled an examined copy is sufficient evidence of the originals ; and the recital of a deed is evidence of its existence against all persons executing the deed containing the recital. And further, as we have already seen, the Vendor and Purchaser Act makes recitals in a deed twenty years old sufficient evidence of the truth of the facts recited. (See *Bolton v. The London School Board*, ante, p. 94.)

(b) A private act of parliament which is directed to be noticed as a public one is proved by production of the Queen's printers' copy, and it is unnecessary to show that the copy is in fact one so printed if it purports to be printed either by the Queen's printers or under the superintendence or authority of Her Majesty's Stationery Office (8 & 9 Vict. c. 113, s. 3, and 45 Vict. c. 9). In other cases the act must be proved by a copy examined with the original.

(c) Awards under an Inclosure Act are proved by a copy or extract signed—(1) By a proper officer of the court if the enrolment has been made in the High Court ; (2) by the clerk of peace of the county or his deputy if it has been made with the clerk of the peace.

(d) Copyhold assurances are proved by copies of the court roll signed by the steward ; as a rule, evidence of his handwriting is not insisted on.

(e) As to a lease and release, the recital of a lease for a year in any conveyance executed before the 15th May, 1841, is, by 4 & 5 Vict. c. 21, sufficient evidence of the execution of such lease.

(f) As to deeds acknowledged by married women prior to the 1st January, 1883, under the Fines and Recoveries Act, you should see that the certificate of acknowledgment has been properly completed, and require proof that it has been duly filed. (See *post*, Part II.)

(g) A fine is proved by the chirograph, as it is called, or by an exemplification under seal of the court, or by a copy examined with the original roll and proved by the oath of the examiner.

(h) A recovery is proved by an exemplification, or by an examined copy. And by 14 Geo. 2, c. 20, after twenty years all recoveries shall be deemed good and valid, if it appears on the face of them that there was a tenant to the writ, and the person joining in them had a sufficient estate and power to suffer the recovery, notwithstanding the deed or deeds for making the tenant to the præcipe may have been lost or not appear.

(i) Disentailing assurances and other deeds enrolled in Chancery are proved by certificates of enrolment, signed by the proper officer, and such certificates are sufficient *prima facie* evidence of due enrolment. Copies of all enrolments, stamped with the seal of the Chancery Enrolment Office, are as good evidence as the original enrolments. (12 & 13 Vict. c. 109, ss. 18, 19.)

(j) A grant from the crown is proved by an exemplification or certified copy.

(k) A will is proved by the production of the probate, or, if that is lost, by an office copy, and this even though it relates to real estate and has not been proved in solemn form, or declared valid in a contentious matter. (20 & 21 Vict. c. 77, s. 64.) The names of the witnesses to the will should be noted; for should a devisee, through whom the title is derived, be also a witness to the will, the devise to him will be void. (1 Vict. c. 26, s. 15.) The same result will follow if the witness was the wife or husband of the devisee. But a gift to a person by will is not revoked by his or her subsequently, and before the testator's death, marrying one of the attesting witnesses. Here the date of the will, not of the testator's death, is considered. (*Thorpe v. Bestwick*.)

If the will has not been proved the purchaser of real property devised by the will must be satisfied with production of the will itself and evidence of its due execution in accordance with the Wills Act, 1837; for, as far as regards real property, a will operates as a conveyance without being proved in the Court of Probate.

(l) As to enfranchised copyholds. If they have been enfranchised under the Acts of 1841, 1843, and 1844, it is carried out by deed, and the deed will be proved in the ordinary way. If it has been effected under the Acts of 1852 and 1858, there will be no deed, but simply an award of the Commissioners, which must have been duly confirmed. An enfranchisement may be presumed from long possession. (*Roe v. Ireland*.)

(m) A feoffment. When you come across a feoffment you should see that a memorandum of livery of seisin is endorsed. On finding such a memorandum you are entitled to presume that livery was duly made, unless possession has not gone consistently with the provisions of the deed, in which case the livery must be proved. In the absence of the memorandum the seisin of the feoffee will have to be proved, as mentioned *post*, p. 104.

(n) Bargain and sale. With regard to this, see first that it is founded on a pecuniary consideration, that no use is limited on the seisin of the bargainee (unless a trust was intended to be created), and that a memorandum of due enrolment is endorsed. You are then entitled to take it for granted that the deed was duly executed. (See *Winscomb v. Dunch*.)

(o) Gift. If you meet with a voluntary deed of gift you should enquire if the donor was solvent at the time he executed it. If the answer is unsatisfactory, and there is reason to believe that the donor is still indebted, you should refuse to accept the title. If the deed is less than two years old you should also in this case decline to complete, even though the vendor was solvent at the time. For by the bankruptcy laws a voluntary deed (if made by a trader under the Act of 1869 and in all cases under the Act of 1883) is void against the trustee in his bankruptcy if he becomes bankrupt within two years of its date, and if he becomes bankrupt within ten years thereafter it is void, unless proof can be given that he was able to pay all his debts without the aid of the property comprised in the settlement. And such a conveyance can be impeached by or on behalf of creditors at any distance of time, on the ground that the voluntary grantor was insolvent at the time of executing the deed under 13 Eliz. c. 5. (See *The Three Towns Building Co. v. Maddison*.) Moreover, as a voluntary deed can be defeated by a subsequent sale for value by the donor, proof should be required that he died without having made any such subsequent conveyance, and that in necessary cases he is dead.

(3) *As to Evidence of Matters of Fact.*

This subject may be roughly divided into two branches—evidence of positive facts or proof that a certain state of affairs exists, and evidence of negative facts or proof that a certain state of affairs does not exist. Under the first head we propose to make a few

remarks on the evidence required to verify identity of the parcels, of seisin, of births, deaths and marriages, of pedigree, of redemption of the land tax, of payment of succession duty, of the payment of the purchase-money, of peculiar customs in copyhold manors. Under the second head we propose to consider briefly what evidence you should ask for as to intestacy, freedom from tithes, that an estate tail has not been barred, failure of issue, the non-existence of easements.

(a) *Evidence of Positive Facts—*

Identity.—Sometimes you will find that the description of the parcels has been altered, or that they are described in one way in one deed, and in another way in another deed. In such a case you should require to be satisfied that the parcels as described in the deeds are identical with those contracted to be sold; evidence of this may be given by means of old plans, leases, parish assessments, declarations of old persons as to the identity of the property, and as to the uninterrupted enjoyment of it by the vendor and his ancestors, or the person from whom he bought it, &c.

Seisin.—Evidence of seisin may be proved by circumstances showing that the person whose seisin has to be proved, dealt with the land in the character of a man who had taken legal possession of it; thus the production of leases granted by him, and which have been followed by possession or the payment of rent (*Clarkson v. Woodhouse*), the assessments to the poor rates, land tax, and other evidence of this nature, will be deemed sufficient.

Births, Deaths and Marriages.—These may be proved by recitals in deeds, &c. twenty years old under the Vendor and Purchaser Act, 1874, or by certificates obtained from the proper registers, or certified extracts from non-parochial registers deposited with the Registrar-General. (3 & 4 Vict. c. 92, s. 9.) When certificates cannot be obtained, declarations by members of the family, entries in family bibles and other books, if made by a member of the family, &c., are receivable as evidence. This evidence can also be corroborated by statutory declarations of members of the family or relations. The reason for requiring the entries in books, &c., and declarations to be made by a member of the family, is that the law presumes that not only are they the persons most likely to

know the truth, but at the same time they are the least subject to the temptation to exceed or fall short of it. (See *Whitelocke v. Baker*.) But as between vendor and purchaser, declarations of persons not actually members of the family, but well acquainted with them, may be taken as proof.

It would seem, from the recent case of *Haines v. Guthrie*, that though such evidence is admissible to establish the descent of one person from another, it is not admissible to prove that a person was born, married or died on any particular date. It must be strictly confined to pedigree.

Pedigree.—The proof of a pedigree will, of course, include the births, marriages and deaths of the persons who, from the pedigree, appear to have been born, married or died. It will further involve the negative proof in some instances that a person died without having married or without having had issue. The first thing to be proved is that the person from whom the descent is traced was a “purchaser” within the legal meaning of the word. Where the descent took place before 1834, the seisin of the ancestor will have to be established, if such ancestor took as an heir and was not himself the purchaser. Next the death and intestacy of the ancestor must be shown; then the relationship of the person alleged to be the heir must be put in proof by declarations and other such secondary evidence. As to failure of issue, it seems that there is a presumption that a person shown to be dead died unmarried and without issue. (*Doe v. Deakin*.) Then the legitimacy of an heir may be required to be established; we have seen that there is a presumption that a child born in wedlock is legitimate, and the presumption may be strengthened by certificates of birth, declarations, &c. Sometimes the register of a baptism states the fact of illegitimacy; such a statement, however, does not seem entitled to much weight. Nor are the declarations of the parents themselves after the birth evidence that can be relied on to prove legitimacy. As a rule, strict proof of a pedigree is not frequently insisted on from the mere difficulty that exists of procuring a completely satisfactory evidence.

Redemption of the Land Tax.—This is proved by the production of the certificate of the commissioners, the receipt of the cashier of

the Bank of England, and the memorandum of registration. (42 Geo. 3, c. 116, and see *Buchanan v. Pouleton*.)

Payment of Succession Duty.—It will be advisable, in the first place, to remind you in a few words in what cases a liability to pay succession duty attaches. The effect of 16 & 17 Vict. c. 51, is as follows:—

(1) Whenever anyone beneficially takes property, or the income thereof, by the death of a person dying after the 19th of May, 1853, whether by the effect of some instrument or by the devolution of law, he becomes a “successor,” and is liable to pay succession duty.

(2) If a joint tenant dies after the date named, the surviving joint tenant must pay duty on the beneficial interest accruing to him by the survivorship.

(3) If A. has a general power of appointment under a disposition of property taking effect on the death of a person dying after that date, and he exercises that power, he (A.) must pay duty; if the power is a limited or special one, the person to whom the property is appointed must pay the duty.

(4) Where the property is subject to a charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person by the extinction of the charge, makes him a successor, and thus liable to pay duty.

(5) In any disposition of property which is not a sale, or which does not confer an interest expectant on death on the person in whose favour it is made, but which is accompanied by some reservation or assurance of, or contract for, any benefit to the grantor or any other person for life, or for any period ascertainable only by reference to death, the person whose interest is rendered more valuable by the determination of such benefit will have to pay duty on the increased value of his interest in the property, the succession here being deemed equal in annual value to the yearly value of the benefit so reserved.

(6) Dispositions to take effect at a period depending on death, or made for evading duty, will confer successions, and persons taking under such dispositions will have to pay duty. If a person makes a disposition of property in such a way that he will acquire

an interest in it again on the death of any person dying after the given date, he will not have to pay duty as a successor, except in the case where he is entitled to the property he so disposes of on the death of some person dying after the date specified in the act, and that person has died during the continuance of the disposition. The object of this is to prevent persons evading a liability to pay duty, by settling the property during the life of the predecessor in such a way that it shall seem to come, not as a consequence of the death of the predecessor, but as a consequence of the death of some person which gives them back the property by virtue of a disposition made by themselves.

(7) Where a succession, before falling into possession, has become vested, by alienation or any title not conferring a new succession, in any other person, the duty is payable just the same ; such, also, will be the case where the title to any succession has been accelerated by the extinction or surrender of any prior interest.

(8) Gifts to charities are liable to a duty of 10 per cent.

(9) Sect. 18 of the Act makes certain exemptions where the whole successions from the same predecessor are not of the value of 100*l.* ; where the whole succession is of less value than 20*l.* ; and in some other cases, *e. g.* where the successor is a husband or wife of the predecessor.

(10) The duty becomes due on the successor becoming entitled in possession.

(11) The successor's interest is to be considered to be of the value of an annuity equal to the annual value of the property during his life, or any less period for which he may be entitled thereto ; the annuity is to be calculated according to certain tables annexed to the act ; and the duty is to be paid by eight half-yearly instalments, the first to become due twelve months after the successor becoming entitled in possession. But if the successor die before all the instalments become due, then any instalments not due at his decease will cease to be payable, except in the case of a successor competent to dispose by will of a continuing interest in the property, when the unpaid instalments will be a continuing charge on the property and be payable by the owner for the time being thereof.

(12) The duty imposed is a first charge on the interest of the successor and of all persons claiming in his right, and also on the

interest of the successor while the property remains in the ownership or control of the successor or his trustee, or of the husband of any wife who shall be successor. It will further have priority over all charges and interests created by the successor, but will not affect or charge any of his real property other than that comprised in the succession.

Such are some of the main provisions of the Succession Duty Act, but it is an enactment of such intricacy and complication that you should, in every case where a question of succession duty arises, consult the act itself, and also look at some of the important cases which have been decided on the construction of it. It will not be going too far to advise you to make an enquiry as to the payment of succession duty in every case in which you find that a person has acquired property by the death of some person dying after the 19th May, 1853. As to the evidence you may ask for that the duty has been paid, sect. 52 of the act provides that the receipt for the duty and a certificate of payment shall exonerate a *bond fide* purchaser for valuable consideration, and without notice, from such duty, notwithstanding any suppression or misstatement in the account.

The Payment of the Purchase-Money.—This is proved by the receipts for the same contained in the body of the deed and endorsed thereon. If the deed is dated before 1882, you should see that both these receipts are mentioned, and you should bear in mind the case of *Kennedy v. Green*, where the unusual position of the receipt on the back of a deed was, with other circumstances, considered as important, as showing that a purchaser had not exercised due diligence, which would have led to the discovery of a fraud. The absence of any receipt is notice, in equity, to the purchaser that it has not been paid, and in such a case positive proof of payment should be required. As to deeds executed after 1881, the Conveyancing Act provides (s. 55), that either the receipt in the body of the deed, or that endorsed thereon, shall, in favour of a subsequent purchaser, without notice that the money has not been paid, be sufficient evidence of the payment of such money.

Customs in Copyhold Tenures.—When the land the subject of the abstract is copyhold, evidence should be asked for as to the existence and nature of any peculiar customs which may be incident to it.

In practice the certificate of the steward of the manor is received as evidence, but strict evidence would consist of presentment of the homage and proof from the rolls that any particular custom had been followed in most cases. Evidence of reputation is also admissible.

Acknowledgment by a Married Woman.—The acknowledgment of a deed by a married woman when such acknowledgment is necessary under the Fines and Recoveries Act (as to when this is necessary, see *post*, p. 173), is proved by a copy of the certificate of acknowledgment filed in court signed by the proper officer. (3 & 4 Will. 4, c. 74, s. 88.) And it must also be seen that a memorandum of the acknowledgment is indorsed on the deed, that it is in the form given in the statute, and that it is signed by the commissioners taking the acknowledgment. But as to deeds requiring acknowledgment executed since 1882, the production of the certificate is no longer necessary, but the indorsed memorandum alone is conclusive evidence that the proper forms have been gone through. We shall speak later on as to the mode in which these acknowledgments are to be taken under the Conveyancing Act, 1882.

Attestation of Instruments.—Certain deeds and instruments are required to be executed in certain ways and attested with certain formalities. In these cases you should see that the statutory requirements have been duly complied with. Thus, bills of sale must be attested with certain formalities (as to which vide *post*, Part II.); again, conveyances within the Mortmain Acts require two witnesses and other formalities; appointments of guardians to infants by their fathers require two witnesses (12 Car. 2, c. 24, s. 8); memorials for registration of deeds relating to property in Middlesex and Yorkshire require two witnesses; and wills of real property executed before 1837, require three, and if executed since then two, witnesses.

Licences.—When you find a provision in a head lease that no assignment or underlease shall be made without the lessor's licence, and your title comes through an assignment or underlease, you must have evidence of the giving of such licence. The production of the last receipt for rent will now be sufficient evidence of this (vide

sect. 8, sub-ss. 4 and 5, of the Conveyancing Act, 1881, and *ante*, p. 96).

(b) *Evidence of Negative Facts*—

Intestacy.—The production of letters of administration to a deceased person's estate are generally accepted as evidence that he died intestate. Searches for a will may also be made in the probate registries of districts where it is likely that a will may be deposited.

Freedom from Tithes.—If the land is alleged to be free from tithes the award of the commissioners to that effect should be produced, for these commissioners have power to make a binding decision as to the existence of any modes of composition or claim of exemption from tithes. (See 6 & 7 Will. 4, c. 71, s. 45.)

That an Estate Tail has not been barred.—It is sometimes necessary to require proof of this: in cases, for instance, where the title is traced through a person who took as heir to a tenant in tail. The fact that the ancestor did not bar the entail should be ascertained by a search in the Chancery Enrolment Office for a disentailing deed.

Failure of Issue.—In proving pedigrees it is sometimes necessary to ask for evidence that some person or other had no issue. We have already mentioned that it is presumed that a person who is shown to be dead, died unmarried and without issue. This presumption may be corroborated by a statutory declaration as to the fact.

Easements.—A general inquiry should be made as to whether there are any rights of way or other easements affecting the property sold. Strict proof that there are none cannot, of course, be insisted on, for the presumption is, that they do not exist, and the vendor cannot be expected to prove a negative. Easements, as you know, may arise by a grant, either express or implied, or by prescription, or in some cases by necessary implication, as where the easement is a way of necessity without which the property cannot be enjoyed. (*Corporation of London v. Riggs*.) As to the

acquisition of easements by prescription, you should refer to the Prescription Act (2 & 3 Will. 4, c. 71), an outline of which has been already given. (See *ante*, p. 86.)

(4) *As to the Proof of Proceedings in Courts of Law.*

Proceedings affecting the estate may have taken place in Chancery, in bankruptcy, or in lunacy. Proceedings in the old courts of law and equity are proved by exemplifications under the seal of the court, or authenticated by the signature of the judge if the court has no seal. Proof of the seal or signature is rendered unnecessary by 8 & 9 Vict. c. 43. By the Rules of the Supreme Court, 1883, office copies of all pleadings, records and documents filed in the High Court are admissible in evidence in all causes and matters, and between all parties and persons to the same extent as the original would be admissible; proceedings in bankruptcy are proved by copies certified in the manner directed by the various acts; and the Act of 1883 provides that any petition or copy of a petition, any order or certificate or copy thereof, any instrument or copy of an instrument, affidavit or document made or used in the course of any bankruptcy proceedings or other proceedings had under that act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever. (Sect. 134.)

Proceedings in lunacy are proved by copies purporting to be signed by the registrar in lunacy, and sealed with his official seal. (15 & 16 Vict. c. 87.)

By the Lunacy Orders, 1883, the office of Registrar in Lunacy is abolished, and its duties transferred to the Senior Master in Lunacy (Ords. VII.—X.); by Ord. XI. the Masters are to have an official stamp; and by Ord. XII. documents stamped with the official stamp are to be acted on by all persons; but when the Order is for the sale, transfer or delivery of securities, the Master is to certify under his hand what are to be sold, &c.

The appointment of a trustee in bankruptcy is, under the provisions of the Bankruptcy Act, 1883, conclusively proved by the certificate thereof, signed by the Board of Trade (sect. 138);

and all documents purporting to be orders or certificates made or issued by the Board, and to be sealed by the Board, are to be received in evidence, and deemed to be such orders or certificates without further proof, unless the contrary is shown. (Sect. 140.)

(5) *General Requisitions and Observations on Title.*

Your requisitions must, of course, be framed with a regard to the nature of the particular title before you, and also to the restrictions under which you are placed by the contract, or by the provisions of recent statutes. It is a bad practice to make unnecessary requisitions for the mere purpose of swelling the volume of the document, and besides, it might possibly result in your having to bear out of your own pocket any extra costs which you may have occasioned by asking needless questions and raising frivolous objections. There are, however, some general requisitions which will be applicable to most titles. A few of these we will now proceed to set out, premising that they are not to be used indiscriminately, but only when they are properly applicable.

Dower.—As a rule, you should ask if any person who has been seised in fee simple or fee tail of the land, was married before 1834, and if in that case he left a widow surviving him, or if he is still living, if his wife is yet in esse. If the widow is still alive you must require her to join in the conveyance, and release her dower; and if the vendor has a wife still living to whom he was married before 1834, she must join in the conveyance to release her right; and the deed must be acknowledged if the parties were married prior to the 1st January, 1883, and the lands were acquired by the husband prior to that date; but in other cases the deed would not need acknowledgment, owing to the provisions of the Married Women's Property Act, 1882. And though dower will seldom attach under the law as altered by the Dower Act, 1833, yet if you find that an owner of the estate has died intestate you should generally ask if he left a widow to whom he was married after 1833, and if he did you should require proof that she is dead, or that the right to dower was barred by a declaration in a deed or will made by him. If such a declaration is contained in a deed, it is not necessary to give the declaration effect that the purchaser

should have executed the deed. (*Fairly v. Tuck.*) But such a declaration in a deed, executed before 1834, will not bar the dower of a wife of the person making the declaration if he was married to her on or after the 1st January, 1834. (*Fry v. Noble.*)

Annuities.—Properly speaking, the abstract should mention whether there are any annuities affecting the property; but in practice they are seldom alluded to. The existence of many of them can of course be ascertained by searching; for, before annuities for life will affect lands in the hands of a purchaser, they are required by 18 & 19 Vict. c. 15, to be registered (see *post*, p. 135). But annuities created by marriage settlement or will do not fall within this act, and so need no registration; it may therefore be advisable to ask generally if there are any annuities affecting the property sold. And when you find that an annuity or rent-charge has been granted, and the land charged with its payment, you should ask if the annuitant is alive, and require the production of receipts to show that the annuity has been duly paid. If any annuitant is living, he should be required to join in the conveyance and release the estate; if alleged to be dead, proof of his death should be required. Satisfaction of any registered annuity, and also of any registered judgment, *lis pendens*, decree, order, rule, rent-charge, or writ of execution, may be entered up at the central office, and certificates of such entry issued. (23 & 24 Vict. c. 115, s. 2.)

Legacies, &c.—When there are any legacies or other sums charged on the land, you should require proof of the payment of them by the production of the receipts signed by the legatee, &c.; and this should be insisted on even though more than twelve years have elapsed since they became payable, because, although after that time they will as a rule be barred by the Statute of Limitations, yet they might still be subsisting by reason of the legatee, &c. being under some disability, such as infancy, and so entitled to an extension of time, or by some acknowledgment given by the executor. (*Shields v. Rice*; *Cooke v. Saltau.*) You should see that the receipt for the legacy is duly stamped, showing the payment of the legacy duties, for, by sect. 28 of the Legacy Duty Act (36 Geo. 3, c. 52), no written receipt or discharge for any legacy, on which duty is payable, shall be received in evidence unless

stamped as required by the act, and no evidence whatsoever shall be given of the payment of legacy without the production of such receipt duly stamped, unless the actual payment of the duty shall first be given in evidence; such payment may be proved by a copy of the entry in the books of the Stamp Commissioners showing the payment of the duty. After thirty years you will be entitled to make a presumption that the legacy, &c. has been discharged, for this is the outside period allowed for bringing an action to recover a legacy, whether there is disability or not, and even though the legacy is charged on the land so as to create an express trust in favour of the legatee. (See 37 & 38 Vict. c. 57, s. 10.)

Satisfied Terms.—As we shall point out when we come to discuss strict settlements, the purpose of creating long terms of years is to secure the payment of jointures and to enable portions to be raised by a mortgage of the term. Now when the purposes for which the term was created are fulfilled, and there remains no useful purpose beneficial to the owner of the term and consistent with the trusts on which the term is directed to be held, the term is said to be “satisfied;” it was the practice for the purchaser of lands when a satisfied term was in existence affecting that land to have it assigned to a trustee for him in trust to attend the inheritance. The effect of this was that the purchaser would be protected from any incumbrance that had been created since the commencement of the term, provided he was ignorant of the existence of that incumbrance at the time he purchased (for he could not use the term to protect himself if he had notice of the incumbrance at the time of his purchase, except in the case of a married woman’s dower, and against that the assignment of the term would protect him even though he had notice of it). But by 8 & 9 Vict. c. 112, which was passed with the object of rendering the assignment of satisfied terms unnecessary, it was enacted that every satisfied term of years which, either by express declaration or by construction of law, should on the 31st December, 1845, be attendant on the reversion or inheritance of any lands, should on that day absolutely cease and determine, but that if it was attendant by express declaration, it should, in spite of its ceasing, afford to every person the same protection against incumbrances as it would have done had it con-

tinued to exist but had not been assigned or dealt with after the 31st December, 1845, and should for the purpose of such protection be considered in every court to be a subsisting term. Further, the act provided that every term of years subsisting or thereafter to be created becoming satisfied after the above date and becoming attendant on the inheritance, either by express declaration or by construction of law after that date, should immediately cease.

It will not, then, be now necessary to obtain the assignment to your client of a term which has been satisfied, provided it is one which comes within the act; and it will be necessary for you to see that they do come within the act, and also to inquire in whom they were vested at the time they became subject to the operation of the act. (See *Lyle v. Earl of Yarborough* and *Shaw v. Johnson*.) The act does not seem to extend to copyholds, customary freeholds or leaseholds. Generally you should see that the document creating the term is abstracted together with the mesne assignments; and if the term is one which has become merged under the act the title to it should be traced down to the time of the merger.

Outstanding Legal Estate.—When you find that the legal estate is outstanding in some trustee or other person, you should require the vendor to get it in, which he will be bound to do at his own expense, in the absence of stipulation, for this is one of the few expenses which is not thrown on the purchaser by the Conveyancing Act, 1881, sect. 3. If the trustee in whom the legal estate is, died before August 7th, 1874, when the Vendor and Purchaser Act came into operation, the legal estate will have descended to his heir or devisee, and a reconveyance must be obtained from him. If the trustee died after the above-mentioned date and before the 1st January, 1881, by sect. 4 of the Vendor and Purchaser Act, 1874, and sect. 48 of the Land Transfer Act, 1875, his legal personal representative must (if at least he is a bare trustee), execute the reconveyance if he died intestate; but if he died having devised the term to a third person, then the devisee would be the necessary party to reconvey; if he died after the 31st December, 1881, then by sect. 30 of the Con-

veyancing Act, 1881, the legal estate will descend notwithstanding any testamentary disposition to his personal representative, who will be the person to reconvey. This enactment will make it a much simpler matter than it formerly was to obtain a reconveyance of the legal estate; for when it was still possible for it to vest in the trustee's heir or in a devisee, it often happened that that heir or devisee was under some disability, as infancy or lunacy, and it then became necessary in these cases to have recourse to an application to the court under the Trustee Acts (13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55) to make a vesting order transferring the estate. As we have mentioned above (*ante*, p. 97), a reconveyance of the legal estate will in some cases be presumed.

Surrendered Leases.—When the property consists of a renewable lease, and the abstract shows it to have been surrendered and renewed, you should require production of the surrendered lease, and to be satisfied that no beneficial interest existed in it which is outstanding, and which would attach to the new lease, and that the surrenderor was the legal as well as the equitable owner of the surrendered lease. (See *Coppin v. Fernyhough* and *Hodgkinson v. Cooper*.)

Marriage Articles.—When you find a marriage settlement which purports to be made in pursuance of articles entered into before the marriage, you should require an abstract of those articles to be furnished to you; for in such a case it will be incumbent on you to see that the terms of the articles are carried out by the settlement itself. (See *Legg v. Goldwire*.)

If you have any suspicions, it is advisable to ask if any settlement affecting the estate has been executed and which has not been noticed in the abstract.

Charges for Improvement Loans, &c.—Inquiries should be made in proper cases if there are any improvement loans affecting the property. For by 8 & 9 Vict. c. 56, certain limited owners of land may with the leave of the court make certain specified improvements on their lands, and charge the money expended on the inheritance; and by the Public Money Drainage Acts owners of

land can obtain advances from government for drainage works, and the advances made will become a rent-charge on the land for a term of twenty-two years. By the Improvement of Land Act, 1864, money may be raised for improving the land by way of a rent-charge; and by the Limited Owners' Residence Act, 1871, the erection of a mansion-house, and the repair or improvement of an existing one, are to be deemed improvements within the last-mentioned act. And by the Settled Land Act, 1882, money may be raised for any improvement for which capital money may under that act be applied.

General Inquiry as to Incumbrances.—Until recently it was the practice to conclude the requisitions with a general inquiry if there were any judgments, crown debts, annuities, *lites pendentes*, lease, mortgage, writ of execution, bankruptcy, or insolvency, or deed or document, or any charge or incumbrance, affecting the property sold and known to the vendor or his solicitor, and not disclosed by the abstract. In the recent case of *Ford v. Hill*, it was held that this was a requisition that the vendor and his solicitor were not obliged to answer. Such a requisition is a “searching inquiry,” and moreover, as it is a misdemeanor to suppress any incumbrance on the title, the answer to such a requisition might tend to criminate, and the general rule is that no witness is bound to answer questions when the replies to them might render him liable to be proceeded against criminally.

You must not, however, rely altogether on the abstract of title furnished to you by the vendor, and the information you can glean from your own investigation of the deeds, &c., produced to you on your attending to verify it; you may be able in many cases to satisfy yourself, by going this far and no farther, that he has a good title, but you cannot be certain that there are no incumbrances on the estate. True, the vendor is bound under penal consequences not to suppress any fact or impediment material to the title; but he is not required to state on the face of the abstract such incumbrances as you could, by the exercise of reasonable care and by making such inquiries as any ordinarily cautious man would make, discover. And it has been held that where there is a condition that no title shall be shown prior to a certain date, an incumbrance prior to that date may be lawfully suppressed. (*Smith v. Robinson.*) And if you

have positive notice that there exists some specified incumbrance on the title, he cannot expect that you can treat it with impunity and disregard it in hopes not to be affected by it merely because the vendor has not given you notice of it. It will then be convenient for us to say a few words on the subject of notice as it affects a purchaser, and mention a few of the inquiries he ought to make from other persons than the vendor. And in doing so we will premise that the maxim "*caveat emptor*" applies to the sale of real as well as to the sale of personal property, and that a purchaser must always be on his guard and not expect to be delivered by the courts of law from the consequences of his own neglect or rashness.

The rule then is that when a purchaser has notice of an incumbrance he will take the property subject to it, although the existence of this incumbrance was not pointed out to him by the vendor.

Notice is of two kinds, actual and constructive. As to actual notice it is sufficient to say (1) it must be given by a person interested in the property and in the course of the negotiations (see *Barnhart v. Greenshields*); (2) it must be given to a person authorized to receive it; and notice to the solicitors of trustees is not notice to the trustees unless the solicitors are empowered to receive it, there being no such relation between a man and his solicitor to make the latter his agent for all purposes (see *Saffron Walden Building Co. v. Rayner*); and (3) the notice must be a clear and distinct one: for mere vague reports from persons not interested in the property will not affect a purchaser.

As to what amounts to constructive notice, this must depend on the particular circumstances of each case, for the term has never received any precise definition. In *Jones v. Smith*, Wigram, V.-C., divided cases on constructive notice into two classes:

- (a) Cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, &c.; and
- (b) Cases in which he has designedly abstained from inquiring for the very purpose of avoiding notice.

But the Vice-Chancellor said, that mere absence of caution, as distinguished from fraudulent and wilful blindness, did not amount to constructive notice, a statement which must be taken to have been qualified by more recent cases. And the mere absence of the title deeds will not affect the purchaser with notice of an incumbrance on the land if he has made *bond fide* inquiry for the deeds and been furnished with a sufficient excuse for their absence. Thus, in the case of *Allen v. Knight*, it was held that an allegation that the deeds had been made into jelly covers was a sufficient excuse for their absence, and that having received such a reply in answer to his inquiries, a purchaser could not be fixed with the consequences of constructive notice that the estate was incumbered. There is also another kind of constructive notice: and it has been settled that notice to an agent, attorney or counsel for a purchaser amounts to constructive notice to the purchaser himself, provided that such agents, &c. obtained the notice in the same transaction as that in which notice to the purchaser is alleged. (See *Fuller v. Bennett*.) And it has been further laid down that where one transaction is closely followed and connected with another, then the two transactions are practically one, and notice received in the first transaction will be constructive notice to the client in the second (*Fuller v. Bennett*; *Hargraves v. Rothwell*); but this would seem to be reversed by the Conveyancing Act, 1882 (*vide post*, p. 121), by which notice to a solicitor is only notice to a client if received in the *same transaction*.

In illustration of the doctrine of constructive notice, you should refer to the following cases, a brief abstract of which we give here. If the title deeds are in the hands of some person other than the vendor, or the person in whose hands you would naturally expect to find them, this amounts to notice that such person has some charge on the estate. In such cases you should make inquiries as to the reason for the unusual possession of the deeds, or you may be saddled with consequences which a seasonable inquiry would have enabled you to have avoided. (See *Mayfield v. Burton* and *Spencer v. Clark*.) Again, notice of any one particular deed is notice of all deeds, facts, &c. which an inspection of that deed would have disclosed. (*Coppin v. Fernyhough*.) And notice of a lease is notice of all the covenants and provisoes contained in that lease. (*Hall v. Smith*.) Thus, if you have notice of a lease which

contains a restrictive covenant enforceable against the land, (*L. & S. W. Rail. Co. v. Gomm*), and are not aware of that covenant by reason of your having abstained from inspecting the lease, you will nevertheless be bound by the covenant. (*Wilson v. Hart*.) And a recent case (*Patman v. Harland*) shows that this would be the case even if the vendor assured you that the lease contained no restrictive conditions; and, moreover, that the Vendor and Purchaser Act (as amplified by the Conveyancing Act), which prevents you requiring a lessor's title to be shown to you, does not affect the point of constructive notice in such a case. For the effect of those acts is merely to put the lessee in the same position as he would have been in if before them he had contracted not to inquire into the lessor's title. The general rule may be qualified under some circumstances; thus, where you get notice of some deed which need not necessarily affect the land, a marriage settlement for instance (for that may relate wholly to other property), and are also told that it does not affect the land, here you are justified in neglecting to look at the settlement, and will not be deemed to have constructive notice of its contents. (*Carter v. Wilson*.) And if the purchase-money is small, and the title is complicated, this may be an excuse for not being so strict in your inquiries, and you may be able to avoid the imputation of constructive notice much more easily. (See *Kettlewell v. Watson*.) Again, notice of an incumbrance which a solicitor possesses is not always equivalent to notice to the client, for it must be notice which has come to the solicitor or agent as such, and in the same transaction as that in which the question arises, or at least in another transaction so closely connected with it as that the two transactions are virtually one. (*Fuller v. Bennett*, *supra*; and see *post*, p. 121.) And where the notice imputed is a fraud committed by the solicitor himself, the knowledge of the solicitor will not be the knowledge of the client, because it is not likely that the solicitor would communicate his own fraud. (See *Cave v. Cave* and *Kennedy v. Green*.)

The whole subject of constructive notice is now codified by the Conveyancing Act, 1882, sect. 8. This provides as follows:—

- (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing, unless:—

- (a) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him ; or,
 - (b) In the same transaction, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.
- (2) This section shall not exempt a purchaser from any liability under or any obligation to perform or observe any covenant, provision, condition or restriction contained in any instrument under which his title is derived, mediately or immediately ; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.
- (3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

The section applies to purchases made either before or after the commencement of the Act.

This section seems to have made no change in the doctrine as established by the cases, except that it confines the knowledge received by a solicitor or agent to the same transaction as that in which the question of notice arises.

You will also bear in mind that you must keep your eyes open for what are known as “patent” defects, for of these the law always presumes you have notice.

(6) *Waiver of Objections to the Title.*

Any objections made to the title, or the right to have a good title shown to you, may be waived before the conveyance of the property to you either expressly or impliedly.

First, as to express waiver. A purchaser is not bound by his counsel's acceptance of a defective title, even though the defect

appear on the abstract. (*Stewart v. Allison.*) And if he accept the title "as abstracted" this does not amount to a waiver of the right of having the abstract properly verified. (*Southby v. Hutt.*) Again, acceptance of the title will not bind him when the vendor conceals some material fact. (*Bousfield v. Hodges.*)

Secondly, as to implied waiver. This may be inferred from the acts of the purchaser. The mere taking possession of the land alone is not generally sufficient to amount to a waiver, if such possession can be accounted for on other grounds than the supposition that the purchaser thereby intended to evince his satisfaction with the title. Thus, if it be taken in accordance with the intention of the parties as evidenced by the contract or by the vendor's consent, it will not amount to waiver. (*Vancouver v. Bliss.*) But if the taking of possession be accompanied with other acts which countenance such a supposition, a waiver may be inferred. Thus, where the purchaser took possession, retained the abstract for a long time, altered and let the premises and apologised to the vendor for his delay in paying the purchase-money, this was held to amount to an admission that the title was approved. (*Margravine of Anspach v. Noel.*) And when a presumption does arise of waiver from the taking of possession, it may be rebutted by other evidence. (*Hyde v. Warden.*) Further, a recent case (*Re Gloag and Miller*) decides that possession taken with a knowledge of defects in the title is not a waiver of the right to have those defects removed by the vendor if he can remove them.

The preparation and tendering to the vendor of the draft conveyance will sometimes, but not always, amount to a waiver of objections to title. Thus, where after the requisitions had been sent in and answered and a draft conveyance tendered to the vendor without prejudice to the requisitions, as the purchaser took no objections to the replies to the requisitions, and the only negotiation pending between them was the payment of the purchase-money, it was held that the title must be deemed to have been accepted. (*Sweet v. Meredith.*) An attempt to re-sell by the vendor is not conclusive that he has accepted the title; but it may be taken in conjunction with other facts so as to lead to that inference. (See *Simpson v. Sadd.*)

(7) *Production of the Deeds.*

You will naturally expect the deeds to be in the possession of the vendor, and *prima facie* they ought to be; if they are not, you should take care that their possession by someone else is satisfactorily accounted for. There are several cases in which the facts of the case may show sufficient reason why the vendor has not the custody of the deeds. Thus:—(1) The person who sold to him may have retained part of the land to which the deeds relate; in this case, by sect. 2 (5) of the Vendor and Purchaser Act, he is entitled to retain the documents, even although the portion retained is the least in value. The production of the deeds, however, can in such a case be enforced in equity on a resale (*Fain v. Ayers*), even although there is no covenant to produce, which there usually will be. Such a covenant cannot always be given; and the Vendor and Purchaser Act, s. 2 (3), specially provides that it shall not be an objection to the title that the vendor is unable to furnish the purchaser with a legal covenant to produce the deeds, provided the purchaser will, on completion, have an equitable right to the production. (2) You may be purchasing from a remainderman; in this case the legal owner of the life estate preceding the remainder is entitled to the custody of the deeds. But he can be compelled by the remainderman to produce them for your inspection—at least, if he be a vested remainderman (*Davis v. Lord Dysart*); if the remainder be a contingent one only, it would seem that the remainderman cannot enforce production (*Noel v. Ward*.) (3) The vendor may have mortgaged the property; in this case the mortgagee will, of course, have possession of the deeds. Before the Conveyancing Act, 1881, the mortgagee was not bound to produce the deeds until he was paid off. (*Sparks v. Montriau*.) Lord Kenyon was so strongly of opinion that a mortgagee should never let the deeds out of his custody, that he is reported to have said that the mortgagee should put his deeds into a box and sit on them till the money was put into his hands. The mortgagor was, indeed, entitled to have the mortgage deed itself produced to him, for that was as much evidence of his right to redeem as of the mortgagee's right to the property. (*Patch v. Ward*.) Now, however, by sect. 16 of the Conveyancing Act, 1881, the mortgagor, as to mortgages

made after the commencement of the act, notwithstanding any stipulation to the contrary, may, as long as his right to redeem subsists, at his own costs, and on paying the mortgagee's costs, inspect and make copies or abstracts of, or extracts from, the documents of title relating to the mortgaged property in the custody or power of the mortgagee. (4) You may be purchasing from one of several joint tenants; in this case the vendor, if he has not the deeds in his own custody, may compel his co-tenants to produce the deeds for the inspection of a purchaser. (*Burton v. Neville.*) Production may be enforced by the court on taking out a summons returnable in chambers. (*Thompson v. Teuton.*) The same rule would seem to apply when you are purchasing from one of several tenants in common.

We must now say a few words as to the place and the expenses of production. The vendor may produce the deeds either at his own known residence, upon or near the estate, or in London; in these cases the purchaser had, and still has, to pay for the necessary journeys, &c. of his solicitor. If, however, the deeds are in London, and your office is in the country, you should not put your client to the expense of a journey by yourself to London, but should instruct your agents there to make the examination. (See *Alsopp v. Lord Oxford.*)

If the deeds are at some other country town, you may go yourself to examine them, or send a clerk. (See *Hughes v. Winne.*)

If the vendor has not got the deeds themselves, but only a covenant for their production, he is bound to procure their production for you. (See *Rippingall v. Lloyd.*)

Sect. 3 (6) of the Conveyancing Act, 1881, is important on this point. It provides that the purchaser shall bear all the expenses of the production and inspection of all acts of parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents not in the vendor's possession, and the expenses of all journeys incidental to production, and the expenses of searching for, procuring, making, verifying and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested stamp office or other copies or abstracts of, or extracts from, such documents; and if the vendor retains possession of any document, the

expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by the purchaser.

On the construction of this section, it has been held, that if a mortgagor sells his interest in the property, the production of the deeds in the mortgagee's possession must be at the expense of the purchaser. (*In re Johnston and Tustin.*) But whether this decision will be upheld on appeal is doubtful.

CHAPTER VI.

SEARCHES FOR INCUMBRANCES.

It will be your duty immediately, or as nearly as possible immediately, before the completion of the sale, to make a search for incumbrances which may affect the title and which are required by the law to be registered. These searches should always be made; or at least such of them as are known as the usual searches, for you will be liable for any loss which may be occasioned by your omission to search. (See *Watts v. Porter*.) The list of searches which you may make is a very long one; but in practice it is not usual unless there are circumstances of suspicion to make them all. We propose to treat in the next few pages of searches for the following incumbrances:—

I. Usual Searches.

- (1) County Registers; (2) Judgments; (3) Crown Debts; (4) *Lites pendentes*; (5) Annuities.

II. Special Searches.

- (1) Judgments in Palatine Counties; (2) Customaryhold Land Court Rolls; (3) Drainage Loans, &c.; (4) Disentailing Deeds; (5) Deeds Acknowledged; (6) Bankruptcy Proceedings.

We then propose to consider as a third main head, The mode in which the search for incumbrances required to be registered in the Central Office of the High Court may be conducted under the 2nd section of the Conveyancing Act, 1882, and the Rules issued thereunder.

I. Usual Searches.

(1) *County Registers.*

When the land which your client is purchasing is situated in any of the counties which are supplied with local registries, *i.e.*, Middlesex, Yorkshire, Kingston-on-Hull, and the Bedford Level, searches should be made in the local registers to see if there are any registered incumbrances which might take priority over the assurance to your client. In a future chapter we shall discuss the requirements of the various statutes which provide for registration of deeds, wills, &c., affecting lands in these counties. At present we shall confine our remarks to pointing out what searches a purchaser should make.

As to Lands in Middlesex and the Bedford Level.—1. A registered incumbrance will not affect your client unless he has also notice of it. (*Tiseman v. Westland.*) 2. But notice of an incumbrance will bind you although it be not registered. (*Chadwick v. Turner.*) 3. A judgment crown debt or *lis pendens*, though registered in the local registry, will not affect you unless it is also registered like a judgment, &c. affecting ordinary lands, in the central office. 4. If you search the register at all you will be deemed to have notice of all incumbrances registered during the period over which you extend your search. As there is no provision for re-registration in these cases, you should search for the whole period covered by the abstract. 5. If you have notice of a judgment registered in the central office you will be bound by it though it is not registered in the local registry. 6. The Middlesex Registry Act (7 Anne, c. 20), does not extend to copyholds, leases at a rack-rent for any period, or occupation leases for twenty-one years or less, to chambers in Serjeant's Inn, the Inns of Court or the Inns of Chancery, or to lands which are registered under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87, s. 127); nor does it extend to lands in the City of London. 7. Six months are allowed for the registration of a will if the testator dies in the United Kingdom; if he dies on or beyond the seas three years are allowed; but it has been decided that where a will is not discovered for more than six months after the testator's death, and

consequently there has been no registration within the six months, the devisees will not be protected against a subsequent sale. (*Chadwick v. Turner*.) And by the Vendor and Purchaser Act, 1874, s. 8, if the will has not been registered within the proper time, nevertheless an assurance from the devisee, if registered before, will have priority over any assurance from the heir-at-law. The result of this is that, on purchasing from a devisee, you need not register the will if on a search you ascertain that there has been no conveyance from the heir, but the registration of the conveyance to your client will be sufficient.

As to Lands in Yorkshire.—Before January, 1885, the effect of the statutes, 2 & 3 Anne, c. 4; 6 Anne, c. 20; 6 Anne, c. 62, and 8 Geo. 2, c. 6, was to put lands in Yorkshire on a similar footing as that on which lands in Middlesex stand. But by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 51, these statutes are repealed, and the law consolidated and amended. As far as incumbrances are concerned the act seems to have introduced the following changes:—

(1) It does not require the registration of judgments, so that it will not be necessary to register judgments in the local registry as well as in the central office in order to obtain priority. The result of this is that a search for judgments in the local registry will be unnecessary.

(2) The act makes registration of any instrument under the act equivalent to actual notice of it, so that you will henceforth be bound by a registered incumbrance although you have no notice of it.

(3) As to conveyances, &c. which are not registered, the act provides that they should not avail even against a purchaser with notice of them, in the absence of actual fraud on his part. Consequently, if, after contract for sale and purchase of lands in Yorkshire, the purchaser hears of an incumbrance on the property, which on searching he discovers is not registered, he can safely complete his purchase, and by registering obtain priority. But if, when the contract was made, he knew of the unregistered charge he could not, apparently, by registering his conveyance, obtain priority, for this would seem to constitute actual fraud.

(4) Besides searching for registered deeds, wills, &c., you must

also, in future, search for registered caveats. The registration of these caveats is an innovation. Shortly, the act provides that a caveat may be registered by any person claiming to be entitled to any lands in Yorkshire in favour of any person named therein, and, when entered, will remain in force for six months (sect. 10); and if within the time the person giving the caveat conveys the land mentioned therein to the person in whose favour it was given, and the deed effecting the conveyance be duly registered, then the assurance will have priority as though it had been enrolled on the date on which the caveat was enrolled.

(5) *As to wills.* When the registration of a will cannot be effected, a notice of the will may be registered, and this will be effectual if the will is registered within two years of the testator's death. (Sect. 11.)

(6) The new act contains provisions for the making of official searches nearly identical with the provisions as to such searches contained in the Conveyancing Act, 1882, as to searches in the central office. (Sects. 20—23.)

(2) *Judgments.*

A creditor who has been at the trouble and expense of taking legal proceedings against his debtor, and who has obtained a judgment against him, is entitled to have a charge on the lands as well as the pure personal estate of the debtor. But in order to prevent purchasers from being deterred from freely buying lands from a fear that they may find them liable in their hands to hidden claims, the legislature has, for the protection of purchasers, provided a system of registration of judgments, &c., and enacted that lands shall not be affected in their hands unless this registration is observed. We propose to give here a brief summary of the statutes which make it necessary for a judgment creditor to register his debt, and to examine what effect they have as against lands in the hands of a purchaser.

(a) *Judgments before 1838.*—Under the Statute of Westminster a judgment creditor could issue a writ of *elegit* under which one half of the debtor's land could be taken; but "land" under this statute did not include copyholds, estates in joint tenancy after the

death of the joint tenant who was indebted, or estates tail in the hands of the issue in tail. Under the Statute of Frauds equitable estates, when held by a trustee for the debtor's sole and beneficial interest, could be taken in execution.

(b) *Judgments after 1838.*—By 1 & 2 Vict. c. 110, the *whole* of a debtor's land was made liable to be seized under an *elegit*, and copyholds and equitable estates, joint estates and estates tail, and property over which the debtor had a general power of appointment, were included. Judgments were made a charge on the debtor's lands, whether held at the date of entering up judgment or subsequently acquired, and were made binding, not only on the debtor, but on all persons claiming under him, including issue of his body, remaindermen and reversioners. But under this statute a judgment creditor, though he acquired the legal estate under an *elegit*, held it subject to prior equitable encumbrances, although he had no notice of them. (*Whitworth v. Gaugain.*) By sect. 19, no judgments by virtue of that act are to affect lands as to purchasers and mortgagees unless registered in the manner provided in the name of the person whose estate is to be affected.

(c) By 2 & 3 Vict. c. 11, re-registration of the judgment every five years was rendered necessary; and it was declared that purchasers and mortgagees without notice of a judgment should not be affected by it, although it was duly registered, any further than they would have been before the 1 & 2 Vict. c. 110. The effect of this statute is that a search for five years back from the completion of the purchase is sufficient to protect the purchaser as far as the extended remedies given to the creditor by the 1 & 2 Vict. c. 110 go. (See *Beavan v. Earl of Oxford*, and *Barham v. Keene.*)

(d) By 3 & 4 Vict. c. 82, s. 2, it was declared that no judgment was to affect lands by virtue of 1 & 2 Vict. c. 110, unless it was registered, notwithstanding that the purchaser had notice of it.

(e) By 18 & 19 Vict. c. 15, it was declared that no judgment which might be registered under 1 & 2 Vict. c. 110, should affect lands as to purchasers, unless a memorandum thereof was registered,

notwithstanding that the purchaser had notice; and by sect. 6, if a judgment is found registered within five years prior to the purchase, it is of no consequence that more than five years has elapsed between that and a previous registration.

(f) By 23 & 24 Vict. c. 38, s. 1, no judgment entered up after the 23rd July, 1860, is to affect any land as to a *bonâ fide* purchaser or mortgagee, even with notice of the judgment, unless a writ of execution has been issued thereunder and registered, and no such writ may be put in force, except within three calendar months from the time when it was registered. The writ is to be registered in the name of the creditor.

(g) Finally, by 27 & 28 Vict. c. 112, no judgment entered up after 29th July, 1864, is to affect land until it has been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority. Under this statute it was held in *The Cowbridge Rail. Co. v. Guest*, that a judgment creditor had no lien on the land until he had got a return to the writ actually placed in the hands of the sheriff; and in *Re The Duke of Newcastle*, it was held that an equitable interest in leaseholds could not be "actually delivered in execution." But in *Hatton v. Hayward*, equitable interests being admittedly within the statute, it was held that if the creditor who has sued out an *elegit* cannot obtain delivery by the sheriff of the lands owing to the legal estate being outstanding, he might apply to the court to remove the impediment, and an order of the court doing so will be equivalent to a delivery in execution within the statute; and at the present time this "equitable execution" is effected by the simple appointment of a receiver by the court in which judgment was obtained. (See *Smith v. Cowell*, and sect. 25 of the Judicature Act, 1873.) In *In re South*, it was held that the sheriff cannot seize a remainder in fee expectant on the death of a tenant for life.

The result of the above statutes, as they affect the searches you should make for judgments, is as follows:—

(1) Search the register at the central office for a period of five years from the date of the search. You will find from the register

will be done upon a certificate of the commissioners or principal officer of the department holding the bond being filed at the office.

(4) *Lis Pendens*.

A *lis pendens*, i. e. an action pending respecting the property, is not in itself an incumbrance on the property, but it fixes the purchaser with notice of an adverse claim or unsatisfied charge against it, and a purchaser will be bound by the decree made whether he has notice of the pending proceedings or not. (*Bishop of Winchester v. Payne*.) But notice of the existence of a registered *lis pendens* creates no charge on the property, and all the registration does is to require the purchaser to look into the claims of the plaintiff who registers it. Therefore, if, on inquiry, the suit turns out to be founded on a claim which is not sustainable, the purchaser cannot refuse to complete. (*Bull v. Hutchins*.) The purchaser will not be bound by a decree in an action which does not directly affect the land itself; thus, where money was secured on an estate, and there was a question in court about the right to that money, but none relating to the estate on which it is secured, the purchaser, if without actual notice, will not be effected by the decree made. (*Worsley v. Earl of Scarborough*.)

Registration of a *lis pendens* is required by 2 & 3 Vict. c. 11, or a purchaser without notice will not be bound by it; and by the same statute re-registration every five years is made necessary.

In effect, then, you should search for a *lis pendens* for five years from the date of your search; if you should find a registered *lis pendens*, you should then require to be satisfied that the pending action or matter is not one which affects the vendor's power to dispose of the property; if it is, you should, of course, decline to complete. Provision is made by 23 & 24 Vict. c. 115, for the entering up of satisfaction to a registered *lis pendens* on the filing of an acknowledgment by the plaintiff in the form and to the effect in the statute mentioned.

(5) *Annuities*.

All annuities granted after the passing of 18 & 19 Vict. c. 15, are required by sect. 12 of that statute to be registered in the Common Pleas at Westminster. The annuities comprehended by

this act are "annuities or rent-charges created otherwise than by marriage settlement or will, for one or more life or lives, or for any term of years or greater estate determinable on a life or lives." If these are not duly registered in the name of the person whose estate is intended to be affected, they will not affect any purchaser or mortgagee. But in this case it has been decided that a purchaser who has notice of such an annuity will be bound by it, although it is not registered (*Greaves v. Topfield*), for there is nothing in the statute requiring registration (as there is in the case of judgments) to exclude the doctrine of Equity as enunciated in *Le Neve v. Le Neve*, that the object of the Legislature in requiring registration being to give notice to the purchaser, a purchaser who has got notice, even though it be informal notice, has all that the statute was intended to give him. There seems to be no provision for the re-registration of annuities, so that the search should extend over the whole period covered by the abstract. Satisfaction of a registered annuity may be entered up under 23 & 24 Vict. c. 115. But it is not enough to prove that the annuity is expired: and length of time will not always operate as a presumption of its satisfaction (*Wynn v. Williams*): evidence should be required that it has been duly paid up to its expiration, as six years' arrears are still recoverable. (3 & 4 Will. 4, c. 42.)

II. Special Searches.

(1) *Searches in Palatine Counties.*

When the lands are situate in the counties of Lancaster or Durham, a search may be made in the Palatine Courts for judgments entered there. It is not, however, necessary to make this search, for a judgment registered in these courts will not affect your client, unless it is also registered in the Central Office. (See 18 & 19 Vict. c. 15, s. 1.) If the search is made, it should extend backwards for a period of five years.

(2) *Searches of Court Rolls.*

When the land is copyhold, a search should be made for encumbrances not appearing on the abstract; such search should

extend over the whole period covered by the abstract. In practice, however, this search is seldom made.

(3) *Drainage Loans, &c.*

In special cases, *e. g.* when the land is extensive and is under cultivation, a search should be made in the Land Registry Office for charges for drainage and land improvement loans created under the several statutes. (27 & 28 Vict. c. 114, ss. 50, 58, and 33 & 34 Vict. c. 56.)

(4) *Disentailing Deeds.*

If the land has been entailed, and there is any reason to suspect that a disentailing deed has been suppressed, a search should be made in Chancery for the enrolled disentailing deed. (3 & 4 Will. 4, c. 74, ss. 40, 41.)

(5) *Acknowledged Deeds.*

When the property has belonged to a married woman before the year 1883, a search should in some cases be made for the acknowledgment of the married woman. Such a search may appropriately be made when it is suspected that she has conveyed away the property by a deed not disclosed by the abstract.

(6) *Bankruptcy Proceedings.*

These should sometimes be searched, but it is a matter entirely depending on the circumstances of the case whether a search should be made. In *Cooper v. Stephenson*, it was held that whenever a solicitor has reason to suspect that an intended mortgagor has been bankrupt or insolvent, he ought to make a search, and it will amount to negligence making him liable to his client if he does not do so. You must use your own discretion as to when it is proper for you to search; if you do search, a five years' search will generally be sufficient, though in some cases it may well be carried back for twenty years.

III. Mode of Searching.

Searches formerly had to be made by the solicitor himself; but the Conveyancing Act of 1882, contains a most useful provision for the making of most of the usual searches by an official of the court; he certifying to the solicitor the result of his investigations. The course pointed out by the act is not a compulsory one, and it is still open for you to make your search in person in the old way. But you will do well to adopt the method of inquiry set out by the statute, for you will thereby avoid the trouble and responsibility of a personal search, and at the same time obtain full protection from any errors in the certificate. As the section of the act will be so useful to you in practice we set it out.

“(1) Where any person requires *for purposes of this section*, search to be made in the central office of the Supreme Court of Judicature for entries of judgments, deeds or other matters or documents, whereof entries are required or allowed to be made in that office by any act, he may deliver in the office a requisition in that behalf, referring to this section.

“(2) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

“(3) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

“(4) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

“(5) General rules shall be made for the purposes of this section.

“(6) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.”

“(7) Nothing in this section, or in any rule made thereunder, shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such rule had not been enacted or made.

“(8) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

“(9) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons shall not be so answerable.

“(10) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

“(11) Nothing in this section applies to deeds enrolled under the Fines and Recoveries Act, or under any other act, or under any statutory rule.

“(12) This section does not extend to Ireland.”

The rules made under sub-sect. 2 shortly provide that the requisition is to state the name and address of the person requiring the search, and that the requisition and certificate shall be filed in the office where the search was made. You or your client will have to sign a declaration in a specified form that the search is required for the purpose of a sale, mortgage or lease, as the case may be. Further, the rules provide forms in which the requisition for searches is to be made, applicable to the several cases of search in the enrolment office for deeds enrolled, in the bills of sale department for bills of sale, in the registry of certificates of acknowledgments of deeds by married women, and in the registry of judgments for judgments, revivals, decrees, orders, rules and *lis pendens*, for judgments at the suit of the crown, statutes, recognizances, crown bonds, inquisitions, and acceptances of office, for executions, and annuities. Provision is also made, when a certificate setting out the result of a search has been issued, for the continuing of the search for a calendar month from the date of the certificate, and the result of the continued search may be endorsed on the original certificate.

Should you have any difficulty in respect of any of the requisitions on title, or the objections thereto, or as to any claim for compensation, or as to any other question arising out of or in connection with the contract (not being a question affecting the validity of the contract), you may, under sect. 9 of the Vendor and Purchaser Act, 1874, apply for assistance to a judge of the Chancery Division, by taking out a summons in chambers. The judge is empowered by that act to make such order as appears just to him, and also to order how and by whom the costs of the application are to be borne and paid. Not only disputed questions of law and construction can be decided by a judge under this section, but also disputed questions of fact. (See *Re Burroughes*.) Applications have been made under this section to decide questions whether an attempted limitation was void for remoteness; whether succession duty was payable, and upon what events; who were the particular persons entitled under a devise to a class; whether a vendor had shown a title to the soil or only to rights of pasturage, &c. The costs will generally follow the event; but they are in the discretion of the court, and in some cases no order will be made as to them (see *Re Kearsley*); and even a successful applicant may be ordered to pay costs. (*Re Cooper*.)

CHAPTER VII.

PREPARATION OF THE CONVEYANCE.

You will now be ready to prepare the conveyance to your client. Before doing so it will be well to inform yourself on some of the points of law relating to deeds. The following hints may be useful:—

I. The Date.

The date of the deed is not of very material consequence. The rule is that a deed operates from the time of its delivery; so that even if the deed is undated, or the date is an impossible one—the 30th of February for example—the time on which the delivery was made will be the real date. And where the date stated in the deed does not correspond with the date on which delivery was made, the deed will take effect from the delivery still. (*Goddard's Case.*)

II. The Parties.

This part of the subject may be considered under two heads, the parties conveying, and the parties to whom the conveyance is made.

(1) *The Parties conveying.*—These may again be subdivided into—(a) The vendor. (b) Incumbrancers, if any. (c) Parties by whose consent or at whose direction the conveyance is made. (d) Parties who do not convey, but who join for the purpose of giving the purchaser covenants for title. (e) Parties who are joined for the purpose of affecting them with notice.

1. *The Parties Conveying.*

(a) *The Vendor.*—The vendor may be the sole owner of the land, both at law and in equity, free from incumbrances. In this case he alone will be the conveying party, unless parties are to be introduced for the purposes mentioned under head (e). When the vendor is under any of the qualified disabilities mentioned in our first chapter, you must see that he conveys through his proper substitutes, or with the proper concurrence. Thus, if he is a lunatic, so found by inquisition, the party to a conveyance of his estate will be his committee, with the consent of the Lord Chancellor, or of the judges having jurisdiction in lunacy. If he is an infant, seised in his own right of the land, he is a tenant for life within the Settled Land Act, 1882, s. 59, and the powers of sale which that act gives to tenants for life will be exerciseable by the trustee of the settlement under which he holds, if there is one; if not, by the person appointed by the Chancery Division, on the application of his next friend or guardian (sect. 60). We shall see hereafter what powers a tenant for life now has of absolutely disposing of the whole fee of the land. Again, if the vendor is a married woman, and the property which is the subject of the sale is not hers for her separate estate, either by the doctrines of law, equity or statute law, her husband must be joined, and the deed be duly acknowledged under the Fines and Recoveries Act. If the husband cannot be found, is incapable of executing a deed, or is living apart from his wife, his concurrence may be dispensed with by the court on the wife's application under sect. 91 of the act; and where the concurrence is dispensed with, the deed need not be acknowledged. (*Goodchild v. Dougal.*) In a recent case (*Re Caine*), the concurrence was dispensed with where the husband and wife had been living apart for a long time, and the husband refused to join unless part of the purchase-money was paid to him.

(b) *Incumbrancers.*—The general rule as to the obtaining of the concurrence of other parties than the vendor himself is that you cannot require him to obtain the concurrence of parties who are unnecessary, even though he has the power to obtain such concurrence. (*Corder v. Morgan.*) But if he has contracted that he will obtain the concurrence of certain persons he must fulfil

that contract, even if the parties' concurrence is unnecessary. (*Benson v. Lamb.*) Suppose the sale is by a mortgagee under a power of sale, can the purchaser require the vendor to obtain the concurrence of the mortgagor? It has been held in *Corder v. Morgan* that he cannot be so required, and this notwithstanding the fact that the mortgagor has in the mortgage deed agreed to join in any sale if required. (See also *Allen v. Marten.*) The powers of sale given to mortgagees by the ordinary express power inserted in mortgages, and that supplied by the Conveyancing Act, 1881, sects. 19, 20, are very ample, and as the purchaser, amongst other things, is not required to make inquiries as to whether a case has arisen to authorise the sale, and the mortgagee's receipt of the purchase-money is a sufficient discharge, there is no necessity for insisting on the concurrence of the mortgagor.

There may be duly registered judgments on foot of which you have notice, and the land may be of such a kind as that the judgment creditors can at law take the property in execution; in such a case you can insist on the vendor obtaining their concurrence. (See *Craddock v. Piper.*)

In some few cases there may happen to be in existence a wife of the vendor who is entitled to the old common law dower out of his lands (as to when this may occur, see *ante*, p. 112). Here the doweress is clearly an incumbrancer, and you will in most cases be entitled to have her concurrence for the purpose of getting a release from her dower.

Satisfied terms are now of no use to furnish a protection against dower, but the old rule was, if there was such a term outstanding created prior to the attaching of the right to dower, as equity would not remove the term in favour of the doweress, the purchaser could not insist on the getting the wife to concur, but would have to be content with an assignment to him of the term in trust to attend the inheritance. (See *Mole v. Smith*, *Maundrell v. Maundrell.*) When the wife's concurrence is necessary, and she refuses to concur, it would seem that you would be entitled to decline to complete; for the wife's claim is not a mere monetary one, but she might actually require to be put in possession of one-third of the land. But in a case where the purchaser expressed himself willing to take the land in spite of its liability to the claims of a doweress, it was held he was entitled to compensation. (*Wilson v. Williams.*) If

the doweress joins you must of course see that the deed is acknowledged by her under the Fines and Recoveries Act, if the lands were acquired by her husband before the 1st January, 1883.

The vendor may be compelled to obtain the concurrence of parties who are bound to convey at his request, *e. g.*, trustees of the legal estate. (*Costigan v. Hastler.*)

(c) *Parties with whose Consent or by whose Direction the Conveyance is made.*—There are many cases in which the consents of third persons may be necessary to an effectual sale. Thus, when the vendor is a married woman, and the property is not hers for her separate use, either at common law, in equity or by statute, the husband must be joined; and further, the deed must be acknowledged under the Fines and Recoveries Act. Again, if the vendor is a tenant in tail, whose estate is preceded by a life estate, and you are purchasing from him the whole fee simple subject to the life estate, the owner of the preceding life estate will be the protector of the settlement (presuming that it was created by the same instrument as that by which the estate tail was created), and his consent will be necessary, or else the vendor will not be able to convey to you more than a base fee. Such consent may be given either in the conveyance to you or by a separate deed, which, however, must be enrolled before or at the same time as the assurance to you is enrolled.

If you are purchasing from trustees land which is settled land within the Settled Land Act, 1882, and there is existing a tenant for life who would have the powers of sale conferred by that act, the trustees cannot sell without the consent of the tenant for life (if several persons together form one tenant for life then the consent of any one of them is all the purchaser can require (see Settled Land Act, 1884, s. 6, sub-s. 2)), unless, as it was decided in *Taylor v. Poncia*, and as is now enacted by the Settled Land Act, 1884, there is an absolute direction to them to sell, when the consent of the tenant for life is unnecessary. And, though under the same statute, the tenant for life has large powers of selling the settled land, and can do so as a rule without the necessity of obtaining any consents, yet if he wishes to dispose of the “principal mansion-house and the demesnes thereof, and other lands usually occupied therewith,” he must obtain the consent of the trustees or an order of the court. (See sect. 16.) There are countless other cases, in

which the consents of special officials or other persons are made necessary to make sales of land complete, required by special acts of parliament; as it would be almost impossible within our limits to give a complete enumeration of these we shall not attempt it.

As an example of a case in which one party may convey by the direction of another party, we may mention the common case where your vendor has sold to you before he has obtained a conveyance of the land to himself from the person from whom he bought. Here, instead of getting his vendor to convey to him and his then conveying to you, he will request his vendor to convey direct to you, he joining to pass his equitable interest and to covenant that he has done nothing to incumber it.

(d) *Parties joined for the purpose of giving Covenants for Title.*—You may also find it of advantage sometimes to join as parties, persons who do not actually contribute anything towards conveying the estate, but whose concurrence may be useful to your client on account of the covenants for title which they can give. Thus, where the trustee of a will is selling under a power of sale, it may be a good thing to obtain covenants for title from the beneficiaries entitled to the proceeds of the sale. For a trustee, as you know, does no more than covenant that he has done no act to incumber, and from the beneficiaries you may get much more satisfactory covenants; but it does not seem that you are entitled to insist on their concurrence. (See *Cottrell v. Cottrell*.) If, however, the sale was made with the consent of the tenant for life, as required by the trust instrument, the purchaser is entitled to covenants for title from the tenant for life limited to his interest. (See *Re London Bridge*.) And when the vendor is a married woman, even if she can convey the whole legal and equitable fee without the concurrence of the husband, yet it is desirable to get him to join if he will do so, not only to confirm the estate and so assure you that the wife has made no dealing with it in his favour, but also to obtain covenants for title from him; for the covenants of the wife will only bind her separate estate and will be without effect if she has none at the time and never thereafter has any.

Again, when a mortgagee sells under his power of sale, though you cannot insist in the concurrence of the mortgagor, it would be

well to obtain it so that he may give you a fresh set of covenants for title, and not leave you to depend on the assignment of those into which he has entered with the mortgagee.

(e) *Parties Joined in order to affect them with Notice.*— Parties are not often in practice joined for the mere purpose of giving them notice of the deed. Direct notice by a separate instrument is more usually given. However, if the persons to whom notice of the assurance ought to be given in any case will join in the deed and acknowledge that they have received it, it will be useful as enabling you on a subsequent sale to dispense with the necessity of having to give the purchaser proof of the service of notice.

2. *The Parties to whom the Conveyance is made.*

In cases where your client has living a wife to whom he was married before the 31st January, 1834, he should take the conveyance in the form of uses to bar dower. That is, the conveyance should be made to him in fee to such uses as he shall by deed appoint, and in default of and until such appointment and so far as any such appointment shall not extend to his use for his life, without impeachment of waste, and after the determination of that estate by any means during his lifetime to the use of a trustee during the life of the purchaser in trust for him, and after the determination of the estate so limited to the trustee to the use of the purchaser in fee simple. For such uses prevent his widow's dower attaching, for under them the purchaser never becomes legally seised in fee of the lands.

When your clients are partners purchasing the estate out of the partnership assets and for partnership purposes, the conveyance should be made to them as tenants in common, not as joint tenants; and for the purpose of facilitating a subsequent sale of the property and keeping notice of the fact that the owners of the property are partners off the title deeds, it is better to make no reference at all to the objects for which the purchase is made. The reason for not making them joint tenants is that if they were made so, on the death of one the survivor would in equity hold

the estate of the deceased partner absolutely, in spite of the legal right of survivorship, for the benefit of the representative of the deceased.

Generally, as to parties taking an interest under a deed of indenture, the old rule was that no person could take an interest who was not named as a party therein. But now, by 7 & 8 Vict. c. 76, s. 11, as re-enacted by 8 & 9 Vict. c. 106, under an indenture an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting the same, may be taken, though the taker is not named as a party.

We will conclude our remarks on this portion of our subject by warning you that you should take great care that the parties are all clearly described, so that no question may be raised on subsequent transactions as to their identity.

III. Recitals.

These are not a necessary part of the deed, and therefore they should only be used sparingly. But because they are unnecessary it must not be inferred that they are harmless; indeed, if you do use them you must do so with the greatest caution, not only on account of the control they may have on the operative part of the deed, but also on account of the doctrine of estoppel, which applies to them. As to the first point, the influence they may exercise on the operative part of the deed, if there is a discrepancy between the recitals and the operative words, the latter will prevail, if at least they are free from ambiguity; but if the operative clauses are ambiguous, then the recitals may be looked to to explain them. (*Jenner v. Jenner*.) They will not as a rule operate so as to supply a total deficiency in the operative part. (*Hammond v. Hammond*.) In one case (*Jenner v. Jenner*), however, where the recitals showed that a married woman concurred to bar her dower, but her name did not appear in the operative part of the deed or in the covenants for title, it was still held that the dower was effectually barred. But in *Young v. Smith*, where it was recited in a settlement that it was agreed that the after-acquired property of the wife should be subject to the terms of the settlement, whereas the following covenant to settle was made by the husband alone, it was held that

the recital would not extend the covenant so as to include the after-acquired separate property of the wife.

As to the second part, the doctrine of estoppel by recital is grounded on the very old principle of law that if a man makes a solemn statement in a deed he will be estopped or prevented from alleging afterwards anything contrary to that statement.

Lord Coke thought that a recital could not have any effect by way of estoppel, because it was not a direct affirmation ; but his conclusion was dissented from in *Bowman v. Taylor* and in *Salter v. Kidley*. Holt, C. J., said, "A general recital is not an estoppel, but a recital of a particular fact is." The rule now is that a recital in a deed will estop the parties to the deed and their privies, *i. e.* persons claiming through them, from showing the existence of a different state of facts from that which would appear from such statements. But to have this effect the recital must be clear and unambiguous (see *Heath v. Crealock* and *General Finance Co. v. Liberation Building Society*), and a recital will not estop a party from giving evidence which explains the deed or shows the intention of the parties thereto. In fact, in estimating how far a recital operates by way of estoppel, the deed must be considered as a whole, in order to discover how far the parties intended to bind themselves by the recital (see *Morton v. Woods*), and in *Severn v. Clerk* it was said, "The recital of itself was nothing, but being joined and considered with the rest of the deed it was material." Again, a recital which only relates to matters foreign to the contract between the parties to the contract does not create an estoppel. (*Fraser v. Pendlebury*). Nor will it estop when the element of fraud enters, or where the party executing the deed is an infant or a married woman (see *Jones v. Frost*), or where the party or someone through whom he claims did not execute the deed containing the recital. Finally, a person is not estopped by his deed from denying a statement therein in a subsequent action between the parties not founded on the deed but wholly collateral to it. (See *Fraser v. Pendlebury* and *Ex parte Morgan*.)

Besides their use as means of estopping the parties from denying the statements made in them, recitals are used for various other purposes. Thus, considering the effect of the Vendor and Purchaser Act, 1874, s. 2 (2), that recitals in a deed twenty years old are evidence, and also the effect of s. 3 (3) of the Conveyancing

Act, 1881, as to recitals, they may be used for the purpose of being relied on as evidence on subsequent sales of the property, and considering the decision in *Bolton v. The London School Board* that a recital in a deed twenty-four years old that the vendor was seised in fee precluded the purchaser from requiring the vendor to carry the title further back, it would not be amiss to insert such a recital in every deed where possible. We should warn you, however, that several eminent conveyancers do not think that this decision can be supported, for it is at variance with the statutory rule that the purchaser under an open contract is entitled to forty years' title.

Again, recitals may be used to preserve a record of certain facts essential to the title, but which would not otherwise appear from the documents of title, *e.g.* deaths, marriages, &c. The recital of these will prove very useful, as they will constitute a kind of index to a purchaser of the places where he may obtain the proper certificates of such facts, births, marriages, &c.

Again, recitals may be used to explain what are the purposes which the parties intend to effect by the deed, and to explain the operative part of the deed by stating all circumstances necessary to render its effect intelligible. And lastly, recitals may be used when the deed in which they occur is effectual only by virtue of its complying with the terms of some other deed to show that the terms have been duly complied with. Thus, where the deed is executed in pursuance of a power given by some previous deed, that previous deed should be recited, so as to show what formalities, if any, are required to be observed in the execution of the power; and by comparing the recital with the power as actually executed by the deed it may at once be seen whether or no the requisite formalities have been duly observed.

Thus, while not advising you to omit recitals altogether, we would wish to impress on you the strong advisability of never using them without there is some definite object to be attained in doing so. Brevity should be the ideal of the modern conveyancer, at least such brevity as is consistent with clearness, accuracy and the attainment of the object with which the deed is to be executed.

IV. The Consideration.

The first point which will occur to you under this head is, Is it necessary to express the consideration at all? For, as you know, the rule as to deeds is that they do not require a consideration to support them, since a deed is not void for want of a consideration. But there are several reasons why the consideration should always appear. The first reason depends on the doctrine of equity, as to the raising of a use. You know that if, before the Statute of Uses came into operation, A. enfeoffed land to B. without any consideration passing that, Equity considered that B. held the land to the use of A. Now, when the statute came into being, the result was, that he who had the use was thereby clothed with the legal estate; so that in the above case there was a resulting use to A., and thus, being clothed with the legal estate by the statute, the result was that the conveyance was inoperative and passed nothing. But where a consideration was expressed, the equitable doctrine of a resulting use did not apply, so that B. in such a case would keep the legal estate.

A second reason for stating the consideration is, that if it be not stated the deed will be presumed to be a voluntary one, and in this case it will be void as against certain outside persons. Thus, by 13 Eliz. c. 5, a conveyance made by one who is in debt at the time to such an amount that he is not able to pay his debts in full, will be void against his creditors, unless it is made *bond fide* and for valuable consideration. And by 27 Eliz. c. 4, a voluntary conveyance of land may be defeated by a sale to a purchaser for value, and this even though the subsequent purchaser has notice of the voluntary deed. And we have also seen that, under the Bankruptcy Act, 1883, a voluntary deed is, for ten years at least, liable to be impeached by the trustee in bankruptcy of the grantor, and is absolutely void as against the trustee if the grantor become bankrupt within two years after making it. As to the difficulties which surround a title when there has been a voluntary deed in the title, see *Clarke v. Willott*.

Another reason for stating the consideration is, that by the Stamp Act, 1870, s. 10, you will be liable to a penalty of 10% if, with intent to defraud, you do not fully and truly set forth all facts and circumstances affecting the liability of the instrument to or the amount of *ad valorem* duty chargeable.

Besides these, another reason for setting forth the consideration and the receipt therefor in the body of the deed is, that by the effect of the Conveyancing Act, 1881, s. 54, such a receipt in deeds executed after the commencement of the act (*i.e.*, after the 31st December, 1881) will operate as a sufficient discharge to a purchaser, the payer thereof, without any further receipt being endorsed. And again, by s. 55 of the same act, the receipt in the body of the deed will (equally with the endorsed receipt), in deeds executed after the commencement of the act, in favour of a subsequent purchaser who has no notice that the money has not been paid, be sufficient evidence of such payment. And, moreover, as we shall see hereafter, the receipt, whether in the body of or endorsed on the deed, will operate as an authority to the purchaser to pay the money to the solicitor who produces such deed.

In old deeds you will find that every party is put down as having received some consideration for the part he took in the deed, such consideration being generally ten shillings, whereas, in fact, even that nominal amount was rarely, if ever, paid to the person stated to have received it. These "nominal considerations" are entirely useless, and have no effect except in the case of a deed intended to operate as a bargain and sale under the Statute of Uses, and no such deed can so operate, even though there is a pecuniary consideration, unless it is enrolled as required by 27 Hen. 8, c. 16, or is a bargain and sale for a term of years. As to the adequacy of the consideration, this is a question into which the court will not go except in cases where fraud is alleged (*Westlake v. Adams*), and the mere inadequacy of the consideration is of no importance except where it is so gross as to amount to an indicium of fraud. (*Rice v. Gordon*.) On the sale of reversions or expectancies by heirs and others, the old rule in a court of equity was that it must be shown that an adequate price was given or else the sale might be set aside. (See *Earl of Aylesford v. Morris*.) This rule, it must be borne in mind, is still in force, and is not abrogated by the provisions of the statute 31 Vict. c. 4, which merely provides that no *bonâ fide* purchase of a reversion made without fraud or unfair dealing shall be set aside merely on the ground of undervalue. (See *Tyler v. Yates*.) So that a prodigal who disposes of a reversionary interest may subsequently avoid the sale on the ground of undervalue, and so may his heir on his death (*Evans v. Cheshire*);

and this even though he be of mature age and a man of the world, fully capable of understanding his own interest (*Bromley v. Smith*), though he proposed the sale and not the defendant, and though he was very pressing that the sale should be carried out. (*Croft v. Graham*.) In a recent case (*Neville v. Snelling*) the doctrine of the *Earl of Aylesford v. Morris* was extended to the case where advances were made on hard terms with a view to making the borrower's relatives repay to prevent the scandal of a bankruptcy. But in a still more recent case (reported in the *Times* of December 9th, 1884—*Browne v. Sanderson*), it was held that the principle of *Neville v. Snelling* would not extend to a case where the defendant did not rely on the plaintiff's expectations or threats to expose him to his father, and where he was of mature age and a solicitor.

V. Operative Words.

In perusing old deeds you will find that the conveyancers of those days were very liberal in respect of the quantity of words which they were wont to introduce into their documents, and particularly in the matter of the operative words in conveyances did they display their lavishness. Thus, in some deeds you will find that the conveying party in a deed was not content with merely "granting and conveying" the property, but would "grant, bargain, sell, alien, convey, release, and confirm" it to the purchaser, and sometimes would say both that he had done so, and that "by these presents doth" do so. The reason for the employment of so many words was no doubt the idea that, if from any cause the nature of the assurance or of the property was such that some special words of conveyance might be necessary to pass the property, the conveyancer, by using all the operative words he knew might at least be sure of including in his catalogue the one applicable to the circumstances of the case, and it was thought that if that certainty was secured, that it mattered but little that the deed was open to the charge of surplusage; and seeing that deeds were paid for by the length, it is not surprising that the conveyancer was rather inclined to verbiage than otherwise. Merely reminding you that all the above words have their proper significance, and that they are each of them appropriate to special

kinds of assurances, we shall pass on to the statute 8 & 9 Vict. c. 106, by which the word "grant" became the appropriate word to pass all hereditaments, corporeal or incorporeal; but the statute did not make the word indispensable, and any words which indicated an intention to grant would have been sufficient. (See *Haggerstone v. Hanbury*.) And sect. 49 of the Conveyancing Act, 1881, merely confirms this, when it enacts that in conveyances made before or after the commencement of the act, the use of the word "grant" shall not be necessary to convey tenements or hereditaments, corporeal or incorporeal. Formerly, if you wished to confer an estate in fee simple on the purchaser, you had to make use of the technical word "heirs;" and to confer on him an estate tail, the words "heirs of his body." But now, by sect. 51 of the Conveyancing Act, 1881, a fee simple may be limited by using the words "in fee simple" without the word "heirs," and an estate tail by the words "in tail" without using the words "heirs of his body."

VI. The Parcels.

It is superfluous to remind you that you should be as accurate as possible in your description of the property, in order that no questions of identity may ever be raised. It is always advisable to take the description of the parcels from that which appears in the abstract; but should that be a very old one, and there is a chance that a verification of the admeasurements as therein given would be a matter of difficulty, it will be perhaps advisable to frame a new description founded on a new survey of the land. In such a case you should incorporate in the deed not only the new but the old description, and refer to the fact that the lands were lately held under the old description.

With reference to faulty descriptions of the parcels, we may remind you of the maxim, "*Falsa demonstratio non nocet*," i. e., where the main description of the property is sufficiently clear and certain to put it beyond a doubt what is intended to be passed by the deed, a subsequent erroneous addition to this description will not prejudicially affect the first one. Thus, the adding to an otherwise clear description of erroneous circumstances as to the locality of the premises, or as to their occupation or otherwise, will not vitiate it. For example, A. grants the farm of Blackacre

to B., and subsequently describes it (contrary to the fact) as in the occupation of X.; this false circumstance will be considered as mere surplusage. Again, if A. conveys to B. all his meadow Blackacre, described as containing ten acres, whereas, in fact, it contained twenty acres, the whole twenty acres will pass to B.

If you use technical words you should take care that you know their legal meaning, and employ them in their proper significances. We here submit to your notice a few of these technical words, with the meanings assigned to them by law.

A Manor will pass all the demesne lands of the manor, and the freehold of the copyholds as well as the seignory; so also will an advowson appendant pass under this term, except when the conveyance is by the crown. (*Att.-Gen. v. Sitwell.*)

A Messuage.—Under this word will pass a dwelling-house with the land attached.

A House.—This will include the curtilage and buildings forming part of or appertaining to it, and also a garden attached to it.

A Farm.—This will pass the farm house and the land held therewith.

Land.—This term includes houses and everything therein or permanently affixed thereto.

Tenement.—This term includes lands and everything which may be the subject of tenure, whether corporeal or incorporeal, real, personal, or mixed.

Water.—This word will only pass the right to the water, and a right of fishing therein, and not the land on which it stands. The proper word to use, if it is wished to pass the land as well as the water, is the word “pool,” or to convey the land and describe it as “covered with water.”

We may note here that if the land abuts on a highway it theoretically extends to the centre line of the highway, and the portion of ground which extends into the highway will pass, although the plan referred to in a description of the property does not show that the boundary line of it extends so far. (*Berrige v. Ward.*)

If after a general description you introduce qualifying words you must keep in mind the rule as to the effect which a qualification has as regards restricting the generality or a prior description. The rule is shortly as follows:—"If general words are preceded by a specification or enumeration of particulars, the general words will not be construed to signify anything of a higher nature or of more importance than or of a different description from what is before expressed." For example, if A. grants to B. all his plate and jewellery "and other effects," the words "other effects" will only pass property of a similar nature to those first mentioned.

Of course fixtures and timber whilst still growing will pass without a separate mention; so also will mines and minerals; and if mines are to be excepted from the grant an express reservation of them must be made. There are, however, exceptions to this rule, for instance, the mines do not pass unless they are expressly mentioned in conveyances by railway companies under the Lands Clauses Act, nor do they pass unless mentioned under an enfranchisement of copyholds.

VII. General Words.

By a simple grant of land, not only the land itself, but all the means of enjoying it, and all its incidents and accessories, will pass by the mere force of the grant itself, the maxim being *Cuiusque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*. So that all easements and privileges legally appurtenant to the land itself will pass without being expressly mentioned. Easements and privileges are said to be legally appurtenant when they are not naturally or originally appendant to the land, *i. e.*, are not natural methods of enjoying, or modes of using the land, but have been annexed to the land or made part of the means by which enjoyment of the lands is obtained, either by some express grant or by prescription, or by long user. As examples of privileges legally appurtenant may be given, rights of way over another person's land, or the right to take water therefrom, and similar rights, known as rights of common, or *profits à prendre*. These rights will pass with the land without special mention. But there are other appurtenances to lands, which are not legally appurtenant to them. There are some easements, *profits à prendre* or

other rights, which, though not appurtenant to the land, have been enjoyed with, or reputed or known as part and parcel of, the land itself. Easements of this description will not pass by a simple conveyance, without being expressly mentioned, and it is to pass these that general words have been employed by conveyancers. In old deeds the parcels used to end up with a long string of general words, comprising every known description of easement, privilege and appurtenance, so that no right which was not legally appurtenant, and so required express mention, might be omitted from the grant; but in later days it has been thought sufficient merely to describe them more generally, *e.g.*, "all liberties, privileges, easements and appurtenances whatsoever to the land belonging or appurtenant, or usually held or occupied therewith, or reputed to belong or be appurtenant thereto."

The necessity of using any general words at all is now in most cases done away with by the Conveyancing Act, 1881, ss. 6, 7, which supplies to all conveyances a sufficiently comprehensive list of general words to pass all kinds of appurtenances, legal or otherwise. The Conveyancing Act does not include mines and minerals in the general words enumerated by it; but, as we pointed out above, with a few exceptions, these will pass without the need of specially mentioning them. It would seem, then, that you will generally be quite safe in omitting the general words altogether.

"*All Estate*" *Clause*.—This was always inserted in deeds after the general words, but practically it was of no use. And now by the Conveyancing Act, 1881, s. 63, as to conveyances made after the commencement of the act (*i.e.*, after 31st December, 1881), it will not be necessary to expressly insert it, as it is made a matter of implication to every such conveyance.

VIII. Exceptions and Reservations.

If you wish to except or reserve anything out of that which you grant by the deed, you must, of course, specially mention it. There is a distinction between an exception and a reservation, which you should bear in mind: an exception is the holding back, as it were, of part of the thing granted, so that the exception must be a part of the thing granted, and, consequently, must be *in esse* at the time

of the grant ; but it must be of a part only, and not of the whole, of the thing granted, and, moreover, it must not be repugnant to the grant, so that if you demised a house and shops, excepting the shops, the exception would be void as being repugnant.

A reservation, on the other hand, can only be of something new issuing out of the thing granted : thus, a rent is said to be reserved. Strictly speaking, you cannot reserve to yourself anything that does not issue out of the land : thus, it is not correct to say that you reserve a right of sporting over the lands ; but in such a case the reservation is allowed to operate as a re-grant by the purchaser of the right. (See *Wickham v. Hawker* and *Hooper v. Clarke*.)

Reservations are in some cases implied by law ; thus, where you retain a portion of the property and sell the rest, the law will presume, in the absence of anything in the conveyance to negative the presumption, a reservation of all such rights and easements over the part conveyed as are essential to the due enjoyment of the part which you retain, *e. g.*, rights of way, light, support, &c. (See *Pearson v. Spencer*, *Richards v. Rose* and *Davis v. Sear*.)

IX. The Habendum.

The function of the habendum is to mark out the estate, *i. e.* the amount of interest, taken by the purchaser. Thus, land may be granted to A. and his heirs, to hold unto and to the use of A. and his heirs.

It is apparent that differences may occur between the limitation following the words of grant, and the limitation in the habendum.

When it thus happens, the question will arise which is to prevail, the interest as created by the operative words, or that created by the habendum ? The rule is, that nothing can be added by the habendum to what has been granted by the premises : so that if there is a grant of the field known as A., habendum, "together with B.," the conveyance will not pass B. as well as A. Indeed, the habendum is considered to be of but secondary importance, and whenever it is inconsistent with the grant in the premises it will simply be void. So that it cannot abridge the estate created by the premises ; and if land is granted to A. and his

heirs, habendum to A. for life only, the habendum will have no effect, and A. will take the whole fee simple. But this must be distinguished from the case where the habendum may be considered as not being repugnant to the grant, but as explanatory of it. Thus, if an estate is granted to A. and his heirs, habendum to A. and the heirs of his body, here the habendum will be considered as used to explain the sense in which the word "heirs" is used in the premises, and A. will take only an estate tail. A mere discrepancy of names between the premises and the habendum is of no importance. The "tenendum," which is generally coupled with the "habendum," is a clause which is at the present time quite superfluous. Before the passing of the *Quia Emptores* Statute (18 Edw. 1), this clause was used to show of whom the feoffee was to hold, and afterwards, and up to the passing of 12 Car. 2, c. 24, its use continued to show by what tenure the lands were held, *i. e.*, whether in free socage or in knight's service.

X. Covenants.

Following the habendum come the covenants. These, of course, vary with the nature of the property. They may be divided into two large classes—covenants by the vendor and covenants by the purchaser. The first class will include the covenants for title, and in addition to these there will be other covenants by the vendor in special cases, and in the second class there will be covenants by the purchaser in the nature of indemnities to the vendor against incumbrances and charges on the land, &c., and covenants by which the purchaser restricts his full *prima facie* rights to the enjoyment of the land.

Covenants are sometimes implied by the use of particular words in the operative part of a deed; but in most cases it is seldom the practice to rely on implied covenants, but express ones are inserted. A notable exception will now occur; for, as we shall see, the covenants for title, which are impliedly annexed to all deeds under the Conveyancing Act of 1881, will as a rule take the place of the old express ones. (*Vide post*, p. 158.) When express covenants are inserted, they qualify the generality of the implied ones, so that it will not extend further than the express covenant.

Before the statute 8 & 9 Vict. c. 106, exchanges and partitions

at common law implied conditions or warranties of title; and the words "give" or "grant" in other conveyances implied similar warranties; but by this statute those assurances are not in future to imply any condition in law, and those words are not to imply any covenant except so far as they may do so by virtue of some act of parliament. Under this qualification covenants will still be implied by the use of the word "grant" in conveyances of land by promoters under the Lands Clauses Consolidation Act, 1845. In bargains and sales of land in the East and North Ridings of Yorkshire the words "grant, bargain and sale" implied covenants for title; but the acts which produced this effect are now repealed by the Yorkshire Registry Act of 1884, and there are no provisions therein on the subject of implied covenants. Further, the word "grant" implies covenants for title in conveyances to the Governors of Queen Anne's Bounty. (1 & 2 Vict. c. 20, s. 22.) Again, the word "demise" in a lease implies a covenant for quiet enjoyment; but as it is an absolute covenant, and only lasts during the life of the lessor, its operation is usually (in the interests of the lessee as well as of the lessor) excluded by inserting an express covenant for such enjoyment. Again, when a lease for years is made "yielding and paying" a certain rent, these words create a covenant for the payment of the rent; but this implied covenant, too, is usually excluded by the insertion of an express covenant, as it does not bind the lessee should he assign the premises. (*Vide post*, Part III.)

Covenants generally as affected by the Conveyancing Act, 1881.—Sects. 10 to 12 of this act make certain provisions as to covenants in leases. These you will find referred to in the chapter on leases (*post*, Part III.). Sects. 58, 59, 60 and 64 relate to the construction of covenants; sect. 58 relates to the *benefit* of a covenant, and enacts that a covenant relating to land of inheritance shall be deemed to be made with the covenantee, his heirs and assigns, and have the same effect as if his heirs and assigns were expressed; and a covenant relating to land not of inheritance is to be deemed made with the covenantee, his executors, administrators and assigns, and have the same effect as if they were expressed. This only relates to covenants made after the commencement of the act. Formerly, the obligation and the benefit of a real covenant

attached upon the successive owners of the property, but otherwise the covenantor's heirs were not bound by, and the covenantee's heirs could not take advantage of, the covenant unless named. This section only applies to covenants relating to land, and its effect is that in such covenants, if they relate to estates of inheritance, the words "heirs and assigns," usually inserted after the covenantee's name, may be with safety omitted since they are incorporated by the act. And in covenants relating to estates *not of inheritance*, the words "executors, administrators and assigns" may now be safely omitted after the covenantee's name. With regard to personal covenants this was always so; that is, the personal representative of the covenantee or his assigns could enforce the covenant, whether named or not.

The section does not extend to incorporate the *heirs and assigns of the covenantor*. As far as regards the "heirs" of the covenantor, the section next considered, *infra*, makes provision. And with regard to the "assigns" the following are the rules:—First, when a man covenants to do something regarding a thing *in esse*, part and parcel of the property conveyed, his assigns are bound, whether named or not. Thus, if a lessee covenants to repair during the term an existing wall in the land demised, his assignee will be bound although not named in the covenant. Secondly, when a man covenants to do something new *on* the land conveyed, the assignee is bound only if named; so that if a lessee covenants to build a wall on the land demised, an assignee of the lease would only be bound by such covenant if named. Thirdly, when a man covenants to do something entirely collateral to the land demised, the assignee is not bound even though named. So that if there was a covenant by a lessee to build a wall on land not part of the land demised the assignee would not be bound in such a covenant though named. These rules are clearly laid down in *Spencer's case*. The effect of this is that as a rule the covenantor's assigns should generally be expressly bound, though even if they are not they will be bound if they take with notice of the covenant (*Tulk v. Moxhay*), whether it runs with the land or not. At least this is so where the covenants are restrictive ones as distinguished from positive covenants to do some act or other. (See *L. and S. W. Rail. Co. v. Gomm*; and see *Hayward v. The Brunswick Building Society*.)

Sect. 60 will enable you to dispense with the words "or the

survivors or survivor of them or the executors or administrators of such survivor or their or his assigns," so usually found in covenants with two or more jointly, and especially in mortgages to trustees who advance money on a joint account.

Sect. 64 provides that in a covenant, proviso, or other provision implied in a deed by virtue of the act, words in the singular or plural number shall include also the plural or singular respectively, and the masculine gender when used shall also include the feminine. This provision is an imitation of 13 & 14 Vict. c. 21, which made similar provisions with regard to expressions contained in all acts of parliament. But that act applied to the expressions used in the words of the acts themselves, whereas sect. 64 applies to expressions occurring in *covenants*, &c., which are to be implied in deeds by virtue of the act.

When the vendor is the absolute owner of the land, and the land is freehold, he usually enters into four covenants for title: these are:—1. A covenant that he has good right to convey. 2. That the purchaser and persons claiming under him shall enjoy possession of the land without any interruption from him or persons claiming through him. 3. That the purchaser shall hold free from incumbrances created by him or by persons through whom he claims, or claiming under him otherwise than by a purchase for value. 4. That he or any one through whom he derives title, otherwise than by a purchase for value, will do everything that may be necessary for the further or more effectually assuring the premises to the purchaser. These covenants you will see are not absolute, but only extend to the acts or omissions of such persons under whom the vendor claims as have not themselves entered into proper covenants, *i. e.*, persons who have not acquired the estate by purchase, a purchase here not including a devise or a marriage settlement. If the subject-matter of the conveyance be leasehold property the vendor further covenants that as far as any acts or omissions done or omitted by him, or by persons through whom he claims, are concerned, the lease is a valid and subsisting one, and that the rent has been paid, and the covenants and conditions have been performed up to the date of the conveyance. If the vendor is merely a trustee, a mortgagee, the personal representative of a deceased person, or the committee of a lunatic not so found, the only covenant or title entered into is, that he

personally has done nothing to incumber the estate. A trustee cannot be compelled to enter into any other covenant, not even a covenant for further assurance. (*Worley v. Frampton.*)

Now, formerly, these covenants for title were set out *in extenso* in the conveyance, but by virtue of the Conveyancing Act, 1881, they may, in future, by the use of appropriate words, be omitted altogether. For by sect. 7 of that act, in conveyances made after the act, the usual covenants for title will be implied, *inter alia*, in conveyances for valuable consideration, whether of freehold or leasehold property, and in deeds conferring a right to admittance to copyhold or customary land, when the party conveying is the beneficial owner, and is expressed to convey as such in the conveyance, or is a trustee, mortgagee, the personal representative of a deceased person, or the committee of a lunatic not so found, and is expressed to convey in such character, or where the person who is the beneficial owner, as such beneficial owner directs some other person to convey (in which case the covenants will be implied on the part of the person giving the direction). And sub-sect. 3 of this section is framed to meet the special case of a husband and wife both joining in the conveyance, and both conveying expressly as beneficial owners. Here the wife is placed in the same position as a person expressed to be conveying by the direction of another person, so that there will be—(1) (as the wife expressly conveys as beneficial owner) a set of covenants for title by her binding her separate estate; (2) (as the husband expressly conveys as beneficial owner) a set of implied covenants for title by him alone; and (3) (as he is a person expressly giving directions as beneficial owner to another person who conveys at his request) another set of covenants on his part extending to the acts of the wife, and of the persons through whom she claims. These implied covenants may be varied or extended, and in such a case they will operate as if the variations or extensions had formed a part of the covenants as implied by the act: but the implied covenants are so comprehensive that it will seldom be necessary to alter them in any way.

As to the burden of these covenants—it will lie on the person, if one, and if there are several, then on each of the conveyancing persons as far as regards his share in the property. And under sect. 59, as we have seen, the covenants will impliedly bind the

heirs and real estate of the covenantor as well as his executors and administrators, and his personal estate.

These covenants will be impliedly entered into with the person to whom the conveyance is made, if one, and if to two or more, then with those persons jointly; and if it is made to tenants in common the covenants will be with each of such persons. Moreover, the benefit of these covenants will go with the estate and interest of the covenantee, and be enforceable by every person in whom that estate or interest or any part thereof is from time to time vested, that is to say, they will run with the land.

There are some special cases of covenants for title which you should notice. Thus, when trustees are selling with the consent of the tenant for life, the latter will give the usual covenants for title, but they will be limited as regards the reversion to the acts of himself and persons claiming under him. (See *Earl Poulett v. Hood*.) When an incumbrancer releases the estate from his charge, he will merely covenant that he has done no act to incumber. When the vendors are tenants in common, the covenants are limited to their several shares; but if they are joint tenants, they sometimes covenant jointly, and sometimes jointly and severally. And their covenants are restricted to the extent of their several interests. Again, sometimes when trustees of a will are selling under a trust to pay debts, &c., and to divide the residue among certain persons who are all *sui juris*, these *cestuis que trusts* sometimes enter into covenants for title, but it does not seem to be an invariable practice for them to do so. Finally, when the vendor is the crown or a person selling to a company under compulsion by the Lands Clauses Consolidation Act, 1845, there will be no covenants for title by the vendor at all.

We will take the opportunity of mentioning here two or three examples of acts or omissions which amount to breaches of the covenants for title. First as to the covenant for good right to convey: this will be broken immediately upon the execution of the deed, if the covenantor has not a good right to convey. (See *Raynolds v. Woolmer*.) So that the time for suing on the covenant (twenty years, see 3 & 4 Will. 4, c. 42) will run against the purchaser from the date of the conveyance. And where the covenant is that the covenantor and another party to the deed have in them a good right to convey, and it turns out that that third party is incapable

of conveying, the covenant will be broken. (*Nasher v. Ashton.*) As to the covenant for quiet enjoyment—in order to constitute a breach of this there must be some disturbance, but actual eviction is not necessary. Thus, where after the sale a decree was made in a suit in Chancery that the land sold was subject to a right of common, it was held that the decree alone, without any entry or actual disturbance of the purchaser, did not amount to a breach. (*Howard v. Maitland.*) Nor will the covenant be broken by a wrongful eviction by a stranger, but it will be so by such an eviction by the vendor or someone who claims through him. As to the covenant for further assurance, in order to ascertain what will amount to a breach of this, it will be necessary to inquire, in the first place, what acts can be required to be done under it. If a bad title be sold, the vendor under this covenant can be called upon to convey such title as he afterwards acquires, even though he acquires it by purchase for valuable consideration (see *Langford v. Pitt*); and this covenant will be broken by a refusal to levy a fine to complete the title, or to satisfy a judgment or other incumbrance. (*King v. Jones.*) And in *Fain v. Ayers*, it was suggested that under this covenant a deed of covenant to produce title deeds might be successfully insisted on, though a doubt was expressed on the point. (See *Hallett v. Middleton.*)

In certain cases the purchaser must enter into covenants with the vendor: thus, if the property entails certain liabilities and burdens on its owner, the vendor who sells it is entitled to covenants from the purchaser that he, the vendor, shall be indemnified from them. (*Moxhay v. Inderwick.*) And on the sale of an equity of redemption, as this entails on the purchaser the liability to pay the mortgage debt and interest, he must covenant to indemnify the vendor therefrom. (*Waring v. Ward.*) And on the sale of a reversion, as the purchaser will have to pay the succession duty when it falls into possession, here, again, he must covenant to indemnify the vendor against it. Again, on the assignment of leaseholds, the assignor, as you know, remains liable to pay the rent and to perform the covenants and conditions of the original lease, so that the assignee must covenant with the assignor to take on himself this liability, and to bear the assignor indemnified therefrom. (See *Moule v. Garrett.*)

But besides these cases it often happens that the vendor only sells part of his property to the purchaser and retains some land adjoining the part sold; in this case he may be desirous of protecting his remaining property from being depreciated in any way by acts of the purchaser, and in order to obtain this protection, he will require the purchaser to enter into covenants restricting his full legal right to use the land in any manner he thinks fit; in fact, to enter into what are known as restrictive covenants.

On the construction of covenants like these, and on the points as to whom they will bind, and who is entitled to the benefit of them, there have been many decisions. The result of them may be shortly stated as follows:—They are, in the first place, covenants in gross, and do not run with the land. (See *Kepple v. Bailey*.) But a covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to bind subsequent purchasers at law (*Tulk v. Moxhay* and *Patman v. Harland*); and further, such a covenant, though not running with the land, and though the assigns be not expressly bound, will nevertheless bind such assigns as have notice of it. (*Wilson v. Hart*.) Nor will a purchaser be able to claim exemption from a restrictive covenant on the ground that not having investigated the title he has not had notice of it when a proper investigation would have disclosed it. (*Nichol v. Fenning* and *Patman v. Harland*.) The rule, however, only applies to restrictive covenants enforceable against the land, and not to positive or affirmative covenants, *e. g.* a covenant by a purchaser of the fee simple that he will erect a dwelling-house on the land, for such a covenant is one *in gross* only, *i. e.* it is *personal* to the covenantor, and subsequent purchasers are not bound even though they may have notice of it. (See *L. & S. W. Rail. Co. v. Gomm* and *Heyward v. Brunswick Building Society*.)

And it has been further decided that where there is a lease of a public-house, and a covenant to purchase beer from one brewer only both for that public-house and for another one held under a different landlord, such a covenant will bind an assignee of the second public-house if he has notice of it. (*Luker v. Dennis*.)

As to the persons entitled to take the benefit of a restrictive covenant, to enable the assignee to take such benefit, there must be something in the deed to define the property for the benefit of which it was entered into. Thus, where the owners of an estate sold part of it to the defendant, who covenanted with them, their heirs and assigns, restricting his right to build, and the owners then sold the remainder of the estate to the plaintiff, there being no reference in the latter conveyance to the restrictive covenants, it was held that the plaintiff was not entitled to restrain the defendant from building in contravention of the covenant. (*Rennals v. Coultinshaw*.) Nor will the benefit pass unless the purchaser has notice of the covenant. Thus, A., the owner of two adjoining plots of land, leased one plot to B., who covenanted not to build in a certain way, and afterwards leased the other plot to C., who entered into similar covenants with A. B. afterwards, with A.'s approval, built so as to contravene the covenant and darken C.'s windows. C. then brought an action to restrain him from committing a breach of the covenant with A., but it was held that he was not entitled to relief, as the covenant did not enure to his benefit, it not being mentioned in the lease to him. (*Master v. Hansard* and *Keats v. Lyon*.) From these cases you will see what an important bearing the fact of notice or no notice has on the right to take advantage of restrictive covenants.

The next species of covenant we have to consider is the covenants for the production and safe custody of the title-deeds.

When the vendor is entitled to and does retain the deeds relating to the estate, he formerly had to enter into covenants with the purchaser for the production of the deeds when called for, and for their safe custody in the interim. When the vendors were trustees the general covenant to this effect was restricted so as to prevent them from incurring any personal liability, and each bound himself only so long as he had the actual custody of the deeds. For this covenant, however, the Conveyancing Act, 1881, s. 9, substitutes a form of covenant, called an Acknowledgment of the right to production, supplemented by an Undertaking for the safe custody of the deeds. It will be advisable to adopt these in most cases, but you should notice that this new substitution for the covenant apparently only applies when the vendor has the deeds in his hands

and retains them. If the deeds are in the hands of some third person the old covenants should be expressly inserted, until it is decided that the Act of 1881 applies, notwithstanding the use of the word “retaining,” to such a case.

The obligations imposed by an acknowledgment are obligations towards the person entitled to require production,

- I. To produce the documents for inspection by him or any one authorized in writing by him upon his request in writing :
- II. To produce the documents at any trial, hearing or examination in any court or commission, or elsewhere in the United Kingdom, on any occasion on which production may be properly required for proving or supporting the title or claim of the person entitled to require such production, or for any other purpose relative to that title or claim :
- III. To *deliver* to him true copies or extracts attested or unattested of and from such documents.

The person who requires production or copies as above must bear the expenses, and the acknowledgment will not confer any right to damages for loss or destruction of or injury to the documents from whatever cause. A summary way of enforcing these obligations is provided for by sub-section 7, which empowers the person for whose benefit the acknowledgment is made to apply to the Chancery Division by summons in chambers for production of the documents, or the delivery of copies thereof or extracts therefrom to the person to be benefited or someone on his behalf. The acknowledgment when given operates to satisfy any liability to give a covenant for production and delivery of extracts or copies of documents.

The acknowledgment binds the documents in the possession of the person who retains them, and in the possession or control of every other person having possession or control of them from time to time ; but so long only as each person has the possession or control thereof. These persons must specifically perform the obligations imposed on them by the acknowledgment, except when prevented by fire or other inevitable accident. The obligations imposed by the acknowledgment are to be performed on the request in writing of—

1. The person to whom the acknowledgment is given :

2. Any person (except a lessee at a rent) having or claiming any estate, interest or right through or under that person, or otherwise becoming through that person interested in or affected by the terms of the documents to which the acknowledgment relates.

The acknowledgment, as we have seen, does not give any right of action for loss or destruction of the documents, from whatever cause arising. Accordingly the act provides that on a person who retains possession of documents giving to another an *undertaking* for safe custody of such documents, the undertaking shall oblige—

(a) The person giving it; and

(b) Every person having possession or control of the documents from time to time,

(but only so long as each person has possession or control of the documents), to keep the deeds mentioned in the undertaking safe, whole, uncanceled and undefaced, unless prevented by fire or other inevitable accident.

The section also provides (sub-sect. 10) a summary mode of applying in chambers in the Chancery Division for the assessment of damages for the loss, destruction or injury to any documents included in an undertaking, and empowers the court to direct inquiries as to the amount of damages, and to order payment thereof by the person liable. Lastly, note that the section only applies if and so far as a contrary intention is not expressed in the acknowledgment or undertaking, and only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of the act.

The acknowledgment or undertaking may be incorporated in the conveyance or may be included in a separate instrument. If the latter course is adopted, the question of what stamps the instrument is to bear will arise: there is no provision in the act concerning stamp duty, and it is the opinion of most eminent conveyancers that an acknowledgment alone need pay no duty at all. (Vide *Meek v. Bayliss*.) Until the point is settled, the undertaking, if under seal, should bear a ten shilling stamp, and, if not under seal, a sixpenny one.

Eminent counsel advise that when a trustee “retains” deeds he

cannot be compelled to give an undertaking, but the purchaser must be satisfied with an acknowledgment. Until this is definitely decided by the courts to be the proper rule, acting for the purchaser you might reasonably insist on having an undertaking drawn in a qualified form, that is, in such a way that the trustee would only be responsible if the deeds were lost, &c. while in his own custody and under his own control, and not if lost, &c. through the default of his solicitor or agent. This is the plan suggested in the last edition of *Prideaux* (the 13th edition), and one which practitioners may reasonably adopt while the question whether a trustee retaining deeds must give an undertaking as well as an acknowledgment remains an open one.

CHAPTER VIII.

THE COMPLETION OF THE PURCHASE.

I. The Execution of the Deed.

As a rule, the deed ought to be read over to the parties to it; at all events, they ought to be acquainted with its contents or purport. And if a party to the deed cannot read it should be read to him, and if it be falsely read it will be void, at least so far as it was misread. It is a moot point whether signature is necessary; but when the case comes within the Statute of Frauds the better opinion would seem to be that it should be signed. In practice, deeds are always signed. On the other hand, sealing is without doubt an essential formality to the deed; but any kind of seal will do, and the mere touching of a seal which has been previously affixed is sufficient and is usually adopted in practice. Again, delivery of the deed is essential: it may be either actual or verbal, or both. Actual delivery is where the deed is actually delivered over by the party executing it to the other party. Verbal delivery is where he uses words to the effect that he delivers it as his act and deed, and this will be effectual even although he retains possession of the deed. A deed also may be delivered as an escrow, i. e. to take effect conditionally only. In this case it should properly be delivered to some third person, with words importing that it is to be delivered to the proper person on such-and-such a condition or at such-and-such a time. But even where the deed is executed in the usual way, yet if it is delivered on a condition which suspends its operation to some future time or event, it will operate as an escrow. (See *Watkin v. Nash*.)

Further, witnesses do not seem to be essential to the validity of a deed unless there is some particular statute or contract which requires witnesses, as, for example, under the Mortmain Acts, or

where a deed of appointment under a power is required to be attested in some particular way. But in practice the conveyance is usually attested by two witnesses, so as to render proof of the due execution of the deed an easy matter in future.

One point which will occur to you upon the completion is, is the purchaser entitled to have the deed executed by the vendor in the presence of his (the purchaser's) solicitor? Previously to the Conveyancing Act, 1881, this was an unsettled point. In some cases he was held to be so entitled, and in other cases he was held not to be so. (*Viney v. Chaplin*, and see *Essex v. Daniell*.) His right to insist on it depended on the circumstances of each case, and it was for a jury to decide whether or not the circumstances were such as to make it reasonable that his demand should be complied with. The 8th section of the above act sets this question at rest, by enacting that the purchaser shall *not* be entitled to require that the conveyance to him be executed either in his or his solicitor's presence; but it enables him at his own cost to have the execution of the conveyance by the vendor witnessed and attested by some person appointed by him, and the act expressly says that he is quite at liberty to appoint his solicitor to be the attesting witness.

II. The Payment of the Purchase-Money.

Another point which will occur to you is, suppose the vendor does not attend in person to complete, is the purchaser justified in paying the purchase-money to his solicitor? Formerly, acting for the purchaser, you would not have been justified in so doing unless he produced a written authority from the vendor authorizing him to receive it, and you could insist on his producing such an authority before paying him the money. (See *Viney v. Chaplin*.) Now, however, in ordinary cases matters are simplified by the Conveyancing Act, 1881, s. 56, which provides that when a solicitor produces a deed which has a receipt either in the body of the deed or endorsed thereon, the deed being executed, or the endorsed receipt signed by the person entitled to give a receipt for the consideration, the deed shall operate as a sufficient authority for the person who has to pay the purchase-money to pay it to such solicitor without having any separate authority. But this section will not be available to you

in all cases : for if the vendors are trustees they have no right to authorize their solicitor or anyone else to receive the purchase-money (see *Waugh v. Wyche* and *Robertson v. Armstrong*) ; accordingly, the act does not authorize trustees to require the purchaser to pay the money to their solicitor on the production of a deed duly executed under this section, nor will a purchaser be safe in so paying his money. (*Bellamy v. Metropolitan Board of Works.*) In *Flower v. Metropolitan Board of Works*, Kay, J., held that where there were several trustee-vendors the purchaser could insist on all the trustees attending personally or else on their giving a written and signed direction that the money should be paid to their joint account in some bank. The purchaser was justified in refusing to pay the money to one trustee authorized by the others to receive it. This decision throws a great deal of difficulty in the way of completing a purchase from trustees ; and until the decision is confirmed by the Court of Appeal the law on the subject cannot be considered as definitely settled.

Connected with the subject of the payment of the purchase-money is that of the liability of the purchaser to see to the application of the purchase-money. Under the old law this liability was a matter of great importance ; when the vendors were trustees the purchaser had to see that the money he paid to them was duly applied by them as directed by the instrument under which they derived their power to sell : from this liability, however, he was free, if the instrument under which they sold expressly declared that their receipts should be good discharges, or without such a receipt-clause if the nature of the trust was such that exemption from the liability could be implied, and it would be so implied when the trust was for the payment of debts generally, or when the money was to be paid over to persons who were not ascertained or who were not *sui juris*, or if the money to be derived from the sale was to be applied upon trusts which required time or discretion for their application. So, too, when executors were selling chattels real, they could give a good discharge for the purchase-money, for the full power to sell their testator's personalty is inherent in the office of executor (see generally on this point *Elliott v. Merriman*). Questions of this sort were, however, rendered of much less importance by 22 & 23 Vict. c. 35, s. 23, which enacted that "the *bonâ fide* payment to, and the receipt of, any person to whom any purchase or mortgage-

money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication, thereof, unless the contrary shall be declared by the instrument creating the trust or security." This enactment was not retrospective, and applied only to instruments executed since August 13th, 1859, and as it only applied to purchasers and mortgagees, it was considered not to be sufficiently ample. Accordingly, Lord Cranworth's Act contained a section upon the subject (sect. 29), which ran as follows: "The receipt *in writing* of any trustees or trustee for any *money* payable to them or him by reason or in exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the person paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof." This enactment only applied to instruments executed after the 28th August, 1860, and could be excluded by the expression of contrary intention. Now, however, by the Conveyancing Act, 1881, it is enacted, "That the receipt *in writing* of any trustees or trustee for any *money, securities, or other personal property or effects*, payable, transferable or deliverable to them or him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application, or being answerable for any loss or misapplication thereof, and the section applies to trusts created either *before or after* the commencement of the act." And finally, by the Settled Land Act, 1882, it is provided (sect. 40) that the receipt in writing of the trustees of a settlement, or of one of them, where one is empowered to act, or of the personal representatives of the last surviving or continuing trustee, for money or securities, shall be a sufficient discharge to the purchaser. The result of these several enactments is, that it will not in future be necessary for you to trouble yourself about seeing to the application of the purchase-money; for if the trustees are selling under powers given them by the settlement, or under the Settled Land Act, their receipts will, whatever the date of the instrument, be a sufficient discharge.

III. Some Special Formalities in connection with the Parties Conveying.

(1) *When the Vendor is a Married Woman.*

If the vendor is a married woman, and the property is not hers for her separate use, either by the doctrines of law or equity, or by statute, the deed will need acknowledgment. This will now apparently only occur in the case of interests in land and reversionary interests in personalty (which she can dispose of under Malins' Act by deed acknowledged) which are not hers for her separate use : nor will acknowledgment be necessary even in these cases where the means by which she can dispose of the property is a deed of appointment under a power, or when the property is vested in her as a bare trustee. (Vendor and Purchaser Act, 1874, s. 6, and see *Dockra v. Dockra*.) In cases where acknowledgment is necessary, it was formerly regulated by the Fines and Recoveries Act, the provisions of which were, by the 8 & 9 Vict. c. 106, extended to contingent interests and executory and future interests in hereditaments, and by 20 & 21 Vict. c. 57, to reversionary interests in personal estate coming to her under any instrument dated after 1857, and not being a settlement made upon her marriage. But the Conveyancing Act, 1882, and the rules made thereunder, make some important alterations in the law, or rather the procedure on the point. The principal change effected is, that an acknowledgment which by that act was required to be made, *inter alia*, before two special commissioners appointed, as by the act provided, may now be made before one perpetual or one special commissioner. Another change effected by the act is that, though the memorandum of acknowledgment which is required by sect. 84 of the Fines and Recoveries Act to be indorsed on the deed after its acknowledgment is retained, yet, by the repeal of the latter part of that section and sects. 85 to 88, the certificate of acknowledgment which those sections required the person taking the acknowledgment to sign, and which had to be filed in the Common Pleas, is now unnecessary, as far as relates to deeds executed after 31st December, 1882. But in cases where a married woman has executed a deed before that date, the certificate is still necessary ; and if it has not been filed before then, it is still to be filed in the way directed by the repealed sections. And further, the repeal of

sect. 87 is not to affect the keeping, as by that section directed, of an index to such certificates as are filed before or after the commencement of the act we are now discussing; and the repealed sect. 88, which provides for the delivery of an office copy certificate to a person applying for it, and enacts that such copy shall be received as evidence of the acknowledgment, is in effect re-enacted. And, lastly, for the repealed section 86, which provided that on the filing of the certificate the deed should take effect from the time of its being acknowledged, and that the subsequent filing of the certificate as aforesaid should have relation to such acknowledgment (the effect of which was that until the certificate was filed the deed was of no validity, *Jolly v. Handcock*), is substituted the provision that where the memorandum of acknowledgment purports to be signed by a commissioner, &c., the deed shall, as regards the execution by the married woman, take effect at the time of acknowledgment; and further, that the deed shall in that case be conclusively taken to have been duly acknowledged.

Sect. 7 is also directed to another point connected with the acknowledgment of deeds of married women. It was apprehended that a deed executed and acknowledged by a married woman under the Fines and Recoveries Act, might be liable to be invalidated by the circumstance that the judge or one or both of the commissioners taking the acknowledgment might be or might have been interested or concerned, either as a party or otherwise, in the transaction giving occasion for such an acknowledgment; and accordingly the statute 17 & 18 Vict. c. 75, was passed, which provided that no deed thereafter duly acknowledged should be impeached or impeachable after the certificate had been filed by reason only that the person or persons, or either of the persons, taking the acknowledgment was or were interested or concerned, either as party or parties, or as attorney or solicitor, or clerk to the attorney or solicitor of one of the parties, or otherwise. Now sect. 7 repeals this statute and re-enacts it in form more applicable to acknowledgment as it will take place under the present act, providing that a deed duly acknowledged shall not be impeached or impeachable by reason of the judge, commissioner, &c. being interested either as a party, solicitor, or clerk to a solicitor for one of the parties interested. And it further authorizes the making of general rules for preventing any person interested from taking an

acknowledgment; but these rules, the section stipulates, shall not make invalid any acknowledgment.

The rules published under this section provide that no person shall take an acknowledgment if he is interested in the matter, either as a party or solicitor, or clerk to a solicitor of one of the parties; that before taking the acknowledgment he must separately examine the woman as to whether she intends to give up the property without having any provision made for her; and if it appears to him that it is intended that provision shall be made for her, he is not to take the acknowledgment until satisfied that some provision has been actually made by some deed or writing produced to him, or where such provision has not been actually made beforehand, then he must require the terms of the intended provision to be reduced to writing and to verify the same by his signature. These rules also give a form of acknowledgment to be endorsed on the deed, and also a form of declaration to be made by the commissioner that he is not interested.

(2) *When the Vendor is an Executor or Administrator.*

You should bear in mind that one of several executors can assign leaseholds, and that the assignment can validly be made even before probate is taken out; but in such a case probate should be asked for as soon as possible afterwards, for this constitutes the only evidence of the executor's title and right to make the assignment. This power does not extend to administrators, who must obtain letters of administration before they can make a valid assignment. (See *Morgan v. Thomas*.) It would seem that if there are several administrators, all need not join in the assignment, but an assignment by one will be good. (See *Jacomb v. Harewood*, which seems to overrule *Hudson v. Hudson*, a previous decision to the contrary.)

(3) *When the Vendor is under some Disability.*

Sometimes it will be necessary to have recourse to the Trustee Act, 1850: this will occur when the legal estate is vested in some person as trustee, and he is unable or refuses to convey, or is not ascertained, or cannot be found, &c. Thus, under this act, the Lord Chancellor and the Chancery Division may make orders vesting the lands in such persons as the court may direct, in the

case of (1) a lunatic or infant trustee or mortgagee; (2) a trustee who is out of the jurisdiction, or who cannot be found; (3) in the case of its being uncertain which of several trustees was the survivor, or of its being uncertain whether the trustee last known to have been seised is alive or dead; (4) or of a trustee who refuses to convey for twenty-eight days after being called upon to do so. Instead of making a vesting order the court may appoint some person to make the conveyance, and this, when made, will have the same effect as a vesting order. And when specific performance or the conveyance or assignment of land is ordered in any action, the court may declare any party to the action a trustee within the meaning of the act, and it may also declare, concerning the interests of unborn persons, who might claim under any party to the action, or the will or voluntary settlement of a deceased person, who during his life was party to the contract or transaction, concerning which the decree in the action is made, that such interests of unborn persons are the interests of persons who would on coming into existence be trustees within the meaning of the act, and thereupon the court can deal with their estates and interests, whether such persons are born or unborn, by vesting orders under the act.

Another case in which you may have to apply to the court, is where the land is subject to some incumbrance which you wish to have cleared off before completion, and there are difficulties in the way of obtaining the concurrence of the incumbrancer. On this point, sect. 5 of the Conveyancing Act, 1881, provides that (whether the land is sold by or out of court) you may apply to the court to allow payment into court—in the case of an annual sum charged on the land, or a capital sum charged on a determinable interest in the land—of an amount sufficient when invested by its dividends to keep down the charge, and in any other case of capital money charged on the land, of an amount sufficient to meet the incumbrance and interest, with a further sum in both cases not exceeding one-tenth of the main amount to meet the contingencies of further costs, interest and expenses, &c. On such payment being made the court may either, after or without notice to the incumbrancer, declare the land free from the incumbrance, and make any vesting order or order for conveyance necessary to give effect to the sale.

IV. Steps to be taken subsequently to the execution of the Conveyance.

We will now presume that you have seen that the conveyance has been duly executed, and that the purchase-money has been paid to the persons entitled to receive it. The next point which you must attend to is to consider what, if anything, must be done by you to perfect the conveyance.

(1) *When the Lands sold are in Middlesex, Yorkshire and Kingston-on-Hull.*

If the land is situated within the district included by any of the Local Registry Acts the conveyance will not be complete until it is registered. But as to land situate in Middlesex the assurance need not be registered if it is copyhold, nor need leases at a rack rent, nor other leases not exceeding twenty-one years in length where the possession and occupation go along with the lease. In Yorkshire similar exceptions prevail, save that the exceptions with regard to leases only extend to leases not exceeding twenty-one years, and other leases must be registered, even though the rent is a rack rent. Again, the Middlesex Act has no operation within the City of London.

The part you will have to play in the registration will be the preparing of the memorial for registration. Whether the land is in Middlesex or Yorkshire this memorial is regulated by nearly the same rules. In the case of a deed it must be under the hand and seal of one of the parties thereto, or of one of his heirs, executors, administrators, guardians or trustees, and must be attested by one or more witnesses, one of whom has been a witness to the conveyance. It must contain the date of the deed, the name and description, &c. of the parties, a description of the lands conveyed, and the name, description, &c. of the person on whose behalf the memorial is registered. In the case of a will (which we will treat of in this place, though strictly it should be discussed in the chapter on wills) the memorial is to be under the hand and seal of one of the trustees or executors thereof, or of some person claiming an interest thereunder, and must be attested by one or more witnesses and contain the date of the will, the date of the death of the testator, his name and description, &c. so far as set

out in the will, the names and descriptions, &c. of the witnesses to the will so far as appears therein, a description of the lands affected thereby, and the names, descriptions, &c. of the persons on whose behalf the memorial is registered. Provisions are also made for the registration of and the preparation of memorials to meet the cases of an order of court, or a certificate of the appointment of a trustee in bankruptcy; of a private act of parliament; of the award of the Land Commissioners; of liens or charges on the land; and of caveats, notices or affidavits affecting the land.

Under the Yorkshire Registry Act, 1884, no instrument will be registered unless, if a deed, the original is produced to the registrar; in the case of a will, the probate or an office copy; if an order of court, an office copy thereof; if a private act, a Queen's printers' copy; if an award a copy thereof under the seal of the commissioners, or a copy thereof signed by the clerk of the peace or his deputy, purporting the same to be a true copy, or the absolute order of the commissioners duly sealed. Immediately on the registration a certificate will be endorsed on the instrument stating the date of the registration, and referring to the page of the register where the same is to be found registered. The effect of registration will be that all assurances registered will have priority according to the date of registration. Registered wills will have priority according to the date of the testator's death, if registered within six months of the testator's decease, but according to the date of registration if that takes place after such period of six months. No person is to lose the priority given by registration merely in consequence of his having been affected with actual or constructive notice, except in cases of fraud; but this is not to confer on any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims, and any disposition which, if unregistered, would be fraudulent and void will remain so in spite of registration. Further, registration is to be actual notice. Provisions are made giving all applicants a free right of search of the registers, and official searches may be obtained on sending in a requisition in writing requiring such search to be made. The result of an official search will be embodied in a certificate, and such certificate will be received in evidence. And certified copies of or extracts from any document registered may be obtained and

will be receivable in evidence except where the laws of evidence require the production of the original document.

(2) *Where the Lands are conveyed for some Charitable Purpose.*

If you are acting for a charity, and the conveyance comes within any of the Mortmain Acts, and so requires enrolment, you must take care to have the assurance enrolled under 9 Geo. 2, c. 36; this enrolment must be effected within six months after execution. You must bear in mind that the enrolment must be made whether or not valuable consideration has been given for the land. But land which is already in mortmain to a charity does not need enrolment. (*Att.-Gen. v. Glynn.*) Nor does a conveyance of two acres or less of land to a society for the promotion of religious, educationary, artistic, or literary objects or the like. (31 & 32 Vict. c. 44.) As to conveyances of land for the purposes of a public park, school-house, elementary school, or public museum, they must be enrolled within six months with the Charity Commissioners, not in the Central Office (34 Vict. c. 13); but a gift by will of more than twenty acres for a park, two acres for a museum, or one acre for a school-house, will not come within this statute, but will fall within the 9 Geo. 2, c. 36, and so be void. Where enrolment is required, the original deed must be enrolled; but by 27 Vict. c. 13, when the original deed is lost, an order may be obtained on summons from the Chancery Division, authorizing any subsequent deed which discloses the charitable trusts to be enrolled instead. And by 29 & 30 Vict. c. 57, the court may authorize the enrolment of a deed after the time limited for so doing, if satisfied that the conveyance was made *bonâ fide* without fraud or collusion, that possession is held under such deed, and that the omission arose from inadvertence. But the enrolment when authorized must be made within six months after the making of the order.

(3) *Some other Special Cases.*

Registration will also be necessary when the deed grants an annuity (*vide post*, p. 188), and enrolment is required when a statutory bargain and sale is the form of assurance made use of (*vide ante*, p. 74), and when the vendor is a tenant in tail, and the design of the conveyance is to bar the entail, enrolment will

also be necessary in this case. And, again, a deed may be enrolled for safe custody, *i. e.*, it may be transcribed on the records of one of the higher courts or of a court of quarter sessions, the effect of which will be that it becomes not a record, but a deed recorded. Again, a transfer of personalty by bill of sale must be registered; but an absolute assignment of chattels does not come within the Act of 1882, but is subject to the Act of 1878. (*Swift v. Pannel.*) The neglect to attest an absolute bill of sale according to sect. 10 of the Act of 1878, will not make it void as between grantor and grantee (*Davis v. Goodman*), nor will omission to register it. But if it remains unregistered it will be void as against the trustee in bankruptcy of the grantor and his execution creditors, as far as regards property which remains in his apparent possession. This subject will be treated of more at length in a subsequent chapter. (See *post*, p. 247.)

V. Some Special Conveyances.

In the above remarks we have chiefly contemplated the case of the conveyance of freehold interests in real property. There remain to be treated of property, real and personal, other than this peculiar kind, and upon the conveyance of which various points of law must be borne in mind. We propose, then, to offer a few remarks on the modes of conveyance, and the law affecting the following kinds of property:—

1. Copyholds.
2. Assignments of Choses in Action.
3. Assignments of Policies of Assurance.
4. Assignments of Goodwill.
5. Grants of Annuities.
6. The Assignment of Letters Patent.
7. Assignments of Copyright.
8. Grants of Advowsons.
9. The Creation of Easements.
10. The Conversion of Long Terms of Years into Freehold.

(1) *Copyholds.*

Copyholds are, as you know, assured by surrender and admittance. The surrender and admittance are usually conducted by the steward of the manor, and as a rule you will have nothing to

do with this part of the matter. The surrender may be made either in or out of court. If made in court, it is entered on the rolls, and a copy of so much of the rolls as relates to the surrender you are interested in will be given to you, and will form the muniments of your client's title. If the surrender is made out of court, a memorandum in writing is made of it and signed by the parties and the steward, and it is then entered on the rolls. No presentment of the surrender to the court prior to enrolment is now necessary. (4 & 5 Vict. c. 35, ss. 89, 91.) The effect of the surrender on the vendor is, that though he remains a tenant of the lord until the surrenderee is admitted, he loses all control over the land, and is unable to surrender to any one else. But it confers merely an inchoate right on the purchaser, which must be completed by admittance, so that the purchaser cannot surrender till he has been admitted. He can, however, assign this right to be admitted by act *inter vivos*, or by will (see *Wainwright v. Elwell*), and if he dies before admittance, his widow will be entitled to dower. The admittance must follow the terms of the surrender, so that the admittance of any other person than the surrenderee will be void; and the purchaser's title upon admittance relates back to the surrender. Fines are usually payable on admittance; these may be either fixed or arbitrary; but even in the latter case they are limited to two years' improved value of the land. But it seems that this limitation does not apply to the case of a voluntary grant. The admission of one of several joint tenants or coparceners is the admission of all, but the fine payable in the case of joint tenants, though a single one in a sense, is increased by the number of the tenants. (See *Bence v. Gilpin*.) But tenants in common must be admitted severally, and a fine will be payable in respect of the share of each. Again, the admission of a tenant for life generally amounts to the admission of all persons entitled in remainder, and one fine only is payable; this the tenant for life usually pays, and he must look to the remaindermen for the repayment of an amount proportionate to their interests. But, in some manors, the remaindermen must be admitted and pay fines upon admittance. Devisees with a trust or power for sale will have to be admitted, and pay a fine before they can convey to a purchaser; so it is usual in such a case, in order to avoid this, not to devise the lands to the trustees, but

merely to *direct* them to sell, for if the property is sold under such a direction, the trustees need not be admitted, but a purchaser from them can claim admittance on the payment of a single fine. (See *Garland v. Mead*.) Formerly, before a man could devise copyhold lands, he had to surrender them to the use of his will, but this was first rendered unnecessary by 55 Geo. 3, c. 192, and though that act has been repealed, its provisions are re-enacted by 1 Vict. c. 26, s. 3.

If there is a custom to that effect in the manor, there may be estates in tail in copyholds, and to such estates the Fines and Recoveries Act applies. These estates tail must, if legal, be barred by surrender; if equitable, they may be barred either by surrender or by deed (sect. 50). If made by deed, the deed must be entered on the court rolls within six months of execution. This subject is regulated by 3 & 4 Will. 4, c. 74, and will be more fully treated of in a subsequent chapter. (See *post*, Part VI.)

When you are concerned in the sale of copyhold lands, you will have little else to do in connection with the assurance of them beyond the preparation of the deed of covenant to surrender, which usually precedes or accompanies the surrender. This deed merely contains a covenant by the vendor to surrender, or cause to be surrendered, the copyhold lands to the purchaser at his costs. In this deed the usual covenants for title are incorporated, and by the use of the prescribed words, "beneficial owner, &c.," they may apparently be so incorporated without the necessity of express mention under the Conveyancing Act, 1881; for a "conveyance" within that act, into which the covenants for title there set out may be implied, includes a covenant to surrender.

A few words on the modes in which copyholds may be enfranchised will, perhaps, not be out of place here. Enfranchisement may be effected independently of any statutory powers, if the lord of the manor and the copyholder mutually agree to make it. But in the case of a voluntary enfranchisement, the lord can only accomplish it when he has the whole freehold of the land in himself, and if he is under any disability he cannot do so; and again, the enfranchisement must be made to the tenant, though it is not necessary in his case that he should have the whole fee; for if he has only a limited interest, and the lord conveys to him the whole fee in the land, the land will become enfranchised, but the tenant

will hold the estate for the benefit of persons interested after him. A voluntary enfranchisement is carried out by deed, whereby the lord conveys the land to the copyholder in fee freed from all the incidents of copyhold tenure, and also grants to the tenant the commonable rights appurtenant to the land. This is necessary, as the enfranchisement in itself extinguishes all the rights of the tenant of this nature. The Copyhold Act, 1841, applies to voluntary enfranchisements, and enables the lord, whether he has the whole freehold interest or not, with the consent of the Copyhold Commissioners (now the Land Commissioners (Settled Land Act, 1882, s. 48)), to enfranchise the lands, and enables any tenant to accept the enfranchisement, both giving certain notices to persons interested when they have not the absolute interest in the lands. The enfranchisement is carried out by deed, which does not seem to need entry on the court rolls. The consideration for the enfranchisement may be charged on the land as a rent-charge, or it may consist of the conveyance of lands to be held subject to the same uses as the lands enfranchised. As to the expenses of the enfranchisement, these lie with the commissioners, who may direct how they are to be borne. If either party is under disability, his guardians, trustees, committee, or some person named by the commissioners, as the case may be, may be substituted for him, and if the lord is under disability the consideration money will be paid into court, or to the trustees. The mines, fishing, and other sporting rights remain in the lord.

Provisions are made for voluntary enfranchisement by the Settled Land Act, 1882, which enables a person who is a tenant for life under the act to sell the seignory of any manor, or the freehold of any copyhold land, reserving or not reserving mines, &c., so as to effect enfranchisement, and to convey the interest so sold to a purchaser. No regrant of any right of common, or other right appurtenant or appendant to the land, is necessary in this case. The regulations which the tenant for life must observe on selling ordinary land under the powers given by the act must also be observed on enfranchising copyholds, so that, *inter alia*, he must give the trustees of the settlement the requisite month's notice of his intention to enfranchise. (As to which see *post*, Part IV.)

Compulsory enfranchisement is provided for by the Copyhold Acts, 1852 and 1858, under which either the tenant or the lord

may insist on enfranchisement by giving the notice thereby prescribed. The tenant cannot require enfranchisement unless he has paid all fines, &c., payable. If the enfranchisement is at the instance of the tenant, the consideration is to be a gross sum of money; if it is at the instance of the lord, an annual rent-charge; but either of them, with the sanction of the commissioners, may agree to vary the character of the consideration. If the parties cannot agree as to the amount of the consideration, it is to be ascertained by valuers under the direction of the commissioners. In this case the enfranchisement is not carried out by a deed, but by an award of the commissioners duly confirmed. The effect of the award is to make the land freehold, but to leave it subject to existing leases, commonable rights, settlements, and incumbrances on the land, and to the lord's rights to mines. The expenses will have to be borne by the party requiring enfranchisement.

(2) *Assignments of Choses in Action.*

Formerly, as you know, the rule was, that a chose in action was assignable in equity; but with some few exceptions it was not assignable at law. (See *Ryall v. Bowles* and *Row v. Dawson*.) The effect of this rule was, that when a chose in action was assigned by deed, in order to enable the assignee to sue in courts of law, it was essential to insert therein a power of attorney from the assignor, enabling the assignee to sue on the chose in his (the assignor's) name. But by the Judicature Act, 1873, s. 25, it is provided that any absolute assignment in writing under the hand of the assignor (not purporting to be by way of charge only), of an interest of any debt or other legal chose in action, of which notice in writing shall have been given to the debtor or other person liable thereon, shall be effectual in law to pass the legal right to such debt or chose in action from the date of such notice, and all legal or other remedies for the same, and power to give a good discharge for the same without the concurrence of the assignor. Provided, that if the debtor has had notice that such assignment is disputed by the assignor, he shall have the right to pay the money into Court, and to call upon the parties to interplead. With reference to this section, it has been decided that it only applies to absolute assignments strictly so called, and that in spite of sect. 24 of the act (which provides, that if a plaintiff claims to be entitled to relief by

virtue of a legal right, which prior to the act could only have been given in a court of equity, the High Court shall give him all such relief as he would formerly have got in the Court of Chancery), if the assignment is by way of mortgage or charge only, the mortgagee cannot bring an action in his own name. (*National Provincial Bank v. Harle*; and see *Re Sutton's Trusts*.) In view of these decisions, and to avoid the necessity of having to prove that due notice in writing has been given to the debtor, it will perhaps be advisable to retain the power of attorney in such assignments, and not to rely on the above section alone. The decision in the case of *Burlinson v. Hall*, however, suggests a way by which, when a chose in action is mortgaged, the assignee can sue in his own name. In this case a legal chose in action, whereby a debt due to A. from C. was, in consideration of money advanced by way of loan to A. by B., assigned absolutely to B. with trusts engrafted upon its assignment. Under these trusts B. was, out of the money received from C., first to pay the costs and expenses incurred; secondly, to pay himself, and thirdly, to hand over the balance to A.; and it was held that this was an absolute assignment, and B. could sue in his own name under the above-quoted section of the Judicature Act.

Notice should be given in every case to the debtor whether the chose is legal or equitable, so as to prevent the debtor paying the money to the assignor and also to obtain priority, for the rule is, that as between two assignees of a chose in action he will have priority who has first given such notice. (See *Lee v. Howlett*.) Where the money is in the hands of trustees notice should be given to all the existing trustees, for though notice to one would be sufficient, so long as the circumstances of the case remained unaltered by the death of that trustee, or his ceasing to continue such trustee or otherwise (*Meux v. Bell*), yet it would not be so if the trustee to whom notice was given had an interest adverse to that of his co-trustees, *e.g.* where he has a beneficial interest which he has secretly encumbered (*Brown v. Savage*). If the chose in action is a fund in court, there will be no person to whom you can give notice (see *Pinnock v. Bailey*); and in this case you should obtain a stop order, restraining the payment of the funds out of court without notice to you. This may be obtained by taking out a summons. If the chose is a stock standing in the debtor's name in the books of any company, you should obtain a *distringas*.

This may be applied to the funds by making an affidavit in the form prescribed by the Rules of the Supreme Court, 1883, and preparing a notice also in the prescribed form and filing it at the Central Office in London. A duplicate of each will be returned to you sealed with the seal of the court, and these you will then serve on the company, and thereupon the funds or stock will stand restricted from being transferred without notice to you or without an order of the court. If some part of the chose assigned is in the hands of the trustees, and the rest in court or invested in stocks or shares, notice must be given to the trustees, and a stop order obtained or a distringas notice filed and served as well. (See *Mutual Life Assurance Co. v. Langley*.)

The notice when given should be a formal one, though except in cases falling within sect. 25 of the Judicature Act, 1873, it need not be a written one; and it has been held that a notice given casually in the course of a conversation, though given by the assignee himself, did not amount to notice. (*N. British Co. v. Hallett*.)

Besides giving notice it is proper, before taking the assignment, to inquire from the debtor if he has received notice of any prior assignment, for of course you will be postponed to any incumbrancer who has given notice before you take your assignment.

If the assignor of the chose in action is a married woman, and it does not belong to her for her separate use, either under the various Married Women's Property Acts or otherwise, and she was married before 1883, you must bear in mind the law as to the rights which her husband has therein. The rule is, that they belong to him, so far as he reduces them into possession during the coverture. The result of this is, if the husband assigns his wife's choses in action and dies before the wife, and before he or the assignee has reduced them into possession, the assignment will be void as against the wife (see *Ellison v. Elwin*), and this is so even if the wife joins in the assignment. (*Proale v. Soady*.) As to what amounts to a reduction into possession, receipt of the money from the debtor by the husband will, of course, have this effect, or the transfer of a fund into his name or a payment to the wife herself. But where the money was paid to a third party to be appropriated to the use of the wife, and he informed her it was at her disposal, it was held that this was not a sufficient reduction into possession. (*Fleet v. Perrins*.) A mere judgment in an action

at law is not sufficient even if the husband dies before execution. (*Bond v. Simmons.*) But an order for payment by a Court of Equity was held to amount to a reduction into possession by the husband. (*Forbes v. Phipps.*) If the chose in action of the married woman is reversionary, she may now assign it by virtue of Malins' Act (20 & 21 Vict. c. 57); but the deed of assignment must be acknowledged.

(3) *Assignments of Policies of Assurance.*

A policy of life assurance was considered a chose in action, and so was not assignable at law; but it might be assigned in equity, so as to enable the assignee to sue on it in his own name. And now, by 30 & 31 Vict. c. 144, assignees of such policies can sue at law thereon in their own names; but no assignment will confer on the assignee the right to sue for the amount of the policy until a written notice of the date and purport of the assignment be given to the company liable under the policy at their principal place of business; and the date of the receipt of such notice will regulate the priority of claims under any assignment; and further, if the company *bonâ fide* pay the assurance money to some third person before receiving such notice they will not be liable to the assignee. For the purpose of facilitating the giving of this notice, companies are required to give an address for the service of it in every policy which they issue, and they may be required, on a request by the person giving the notice, to deliver to him a written receipt of it, which will amount to conclusive evidence of the due receipt thereof.

Under this act it has been held that a mere agreement to assign a policy is not an assignment of a policy within the act. (*Spencer v. Clarke.*) In the assignment the vendor generally covenants that the policy is subsisting and valid, that all premiums have been paid up to date, that he will do nothing whereby it may be avoided or by which the premiums may be increased, and that if he does do so he will pay the advanced premium.

Acting for a purchaser of a policy you should require evidence that the statements upon which the policy was granted were true, and that the last payment of the premiums has been duly made, and if the policy is effected on the life of some person other than the assignor, you should require to be satisfied that the person effecting the insurance had an insurable interest in that person's life.

Choses in action (other than debts due or growing due in the course of the bankrupt's trade or business) not being within the order and disposition clause of the Bankruptcy Act, 1883, should the assignor of a life policy become bankrupt before the assignee had given notice to the company of the assignment, the assignee and not the trustee in bankruptcy would be entitled to the benefit of the policy. (See *Re Moore*.)

(4) *Assignments of Goodwill.*

There are several points to be attended to on the assignment of the goodwill of a business. First, you must bear in mind that in the absence of stipulation to the contrary the vendor of the goodwill may set up a precisely similar business to that sold, and that next door to the premises where the original business was carried on. (*Churton v. Douglas*.) But he cannot use the old name under which the business was carried on even if this name happens to be the same as his own. (See *Levy v. Walker*.) And secondly, he is quite at liberty to deal with the old customers of the business sold (*Leggott v. Barrett*); and thirdly, he may even go so far as to solicit the favours of the old customers (*Pearson v. Pearson*, overruling *Labouchere v. Dawson*, and see also *Walker v. Mottram*). In view of these decisions you should take care that some provision is made in the assignment to protect the rights of the purchaser. Thus it is proper to have a covenant by the vendor that he will not set up a similar business within such and such a distance of the premises where the business the goodwill of which is sold is carried on: and in framing such a covenant you must be careful not to infringe the rule that covenants in total restraint of trade are void. (As to this point see *Mitchell v. Reynolds*.) It would be desirable, perhaps, also to have a covenant by him that in the event of his setting up business outside the stated radius he will not solicit or deal with the old customers, though it is a question if such a covenant might not be held void as being in restraint of trade.

(5) *Grants of Annuities.*

The payment of a mere personal annuity (*i.e.*, an annuity which is not charged on the land of the grantor), is usually

secured by a bond; or it may be created by a deed of grant, in which it is generally the practice to join some third person as a surety. The deed of grant should contain a covenant by the grantor to pay the annuity, and upon this covenant he can be sued if any instalment of the annuity is in arrear. But annuities are more usually charged on land, in which case they are, strictly speaking, rent-charges. In such cases it was formerly necessary to insert in the instrument by which the annuity was granted clauses giving the grantee power to distrain for arrears on the land out of which the rent-charge or annuity issued; for a rent-charge is unconnected with tenure, and it was only in cases of a person being entitled to a rent by virtue of a tenancy that he was able at common law to distrain. By 4 Geo. 2, c. 28, s. 5, a power of distress was given to recover a legal rent-charge, and now this power is again conferred by sect. 44, sub-sects. 1 and 2 of the Conveyancing Act, 1882, and is made applicable, not only to rent-charges, strictly so called, but to all annual sums arising out of any land, whether charged on the land itself or on the income of the land; but it does not apply to any rent incident to a reversion, *i. e.*, connected with tenure, between the parties. This power of distress arises whenever the annual sum or any part of it is in arrear twenty-one days. But in an express grant of a rent-charge payment is usually secured not merely by a power of distress, but further powers are given to enter on the land and receive the income and profits thereof; and sometimes a power is given to the grantor, if the rent is in arrear for a very long period, *e. g.* two years, to enter on the land and hold the same absolutely again as in his former estate. Neither of these powers were conferred by the statute of George II.; but now, by the above section of the Conveyancing Act, if any annual sum charged on land, &c. is forty days in arrear (although no legal demand has been made for payment thereof), the person entitled to receive it may enter into possession of the land and take the income thereof until thereby or otherwise the annual sum and arrears, and all costs and expenses occasioned by non-payment, are fully paid; such possession when taken to be without impeachment of waste. This is almost word for word the usual power of entry and reception of rents and profits contained in grants of rent-charges. As to the reason for the insertion of the words "although no legal demand has been made for payment

thereof," this is to obviate the necessity of the grantor having to make a troublesome demand for payment, with all its formalities required by the common law, before a proviso for re-entry in case of non-payment of rent could be taken advantage of. (*Vide Duppa v. Mayo.*)

Besides the above power the act gives the grantor another remedy for recovering his rent when it has been in arrear forty days,—a power which is not usually contained in express deeds of grant. This is the power, whether taking possession or not, by deed to demise the land charged, or any part thereof, to a trustee for a term of years (with or without impeachment of waste) upon trust; (a) by mortgage; (b) by sale; (c) by demise for all or any part of the term, or (d) by receipt of the income of the land, or (e) by all or any of the above means, or (f) by *any other* reasonable means, to raise and pay the annual sum and arrears and the costs and expenses incurred by the non-payment thereof (including the costs of the preparation and execution of the deed of demise and the costs of the execution of the trusts of that deed).

The section you should note only applied to instruments coming into operation after the commencement of the act, and may be excluded or varied.

As we have already mentioned, by 18 & 19 Vict. c. 15, s. 12, an annuity granted otherwise than by marriage settlement or will for a life or lives or a term of years, or greater estate determinable on a life or lives will not affect lands unless a memorandum containing the name, description, and residence of the person whose estate is to be affected, and the date of the instrument creating it, and the amount thereof is registered in the Queen's Bench Division; but it has been held under this act that an annuity though not so registered is not void as against a subsequent purchaser of the land who has notice of the annuity. (*Greaves v. Topfield.*) As regards the recovery of arrears of an annuity, even when there is a covenant for the payment of it, only six years' arrears can be recovered under 3 & 4 Will. 4, c. 27, s. 42, and this not only as against the land but also upon the covenant: for the old rule that, although the remedy against the land was barred by lapse of time, the remedy upon the covenant remained, seems to have been overruled. (See *Sutton v. Sutton* and *Fearnside v. Flint.*)

(6) *The Assignment of Patents.*

Whether or not the assignment of a patent must be by deed does not seem clearly to be established. There is no direct statutory provision on the point, and as patents are merely personal property it would seem as if they might be assigned without deed. But as Mr. Williams, in his *Principles of the Law of Personal Property*, p. 394, says, "Perhaps the necessity of assignment by deed may be implied from the clause in the letters patent which forbids the use of the invention without the consent, licence, or agreement of the inventor in writing under his hand and seal." In any case it will always be advisable to have a deed of assignment. A licence to use the patent should also be under seal. By the Patents Act, 1883, all assignments and licences must be registered at the Patent Office stating the district to which the patent licence relates, the name of any person having any share or interest in the patent or licence, and the date of the acquiring thereof, and any other matter affecting the proprietorship therein; and a copy of the entry on the register certified in the prescribed manner will be given to the person requiring it, and will amount to *prima facie* evidence of the assignment or licence, and until such entry has been made the grantee of the patent will be deemed the sole and exclusive proprietor of it. Any assignee or other person becoming entitled to a patent may procure himself to be registered as the proprietor of it. But even where the assignment is not registered it would seem that the assignee can sue the assignor and licensees from him with notice of the assignment. (See *Hassall v. Wright*, a case decided under the Act of 1852.)

The deed of assignment generally contains covenants for title by the vendor which comprise covenants that the patent is valid and subsisting, and not voidable, that the assignor has not previously assigned it or granted any licence to use it, for quiet enjoyment, for further assurance, and that the assignor will aid in procuring a prolongation of the patent term and its extension to other countries. Sometimes, also, he covenants that he will communicate to the assignee any improvements he may from time to time make in the invention the subject of the patent.

(7) *Assignments of Copyright.*

These seem to need but few remarks. The assignment may either be by deed, or it may be made under the provisions of the Copyright Act, 1842, s. 13, which provides that the registered proprietor of a copyright may make an entry in the register of assignments in the form given in the schedule to the act, and that such entry will have the same effect, without being subject to stamp or any other duty, as an assignment by deed. Registration under this act does not affect the validity of the copyright, but the want of registration merely bars the right to sue for an infringement. The assignment includes the right to sell the stock of copies of the book which remains in hand, although the term of the copyright has expired. (*Howett v. Hall.*) It does not seem usual to insert any covenants by the assignor in the assignment.

(8) *Grant of an Advowson.*

You must distinguish between an advowson and the right of next presentation to a benefice; an advowson is the perpetual right of presentation to a benefice, while the next presentation is merely the right to present upon the vacancy which occurs next after the grant. The free alienation of advowsons and next presentations is curtailed considerably by the laws against simony, *i.e.*, the corrupt presentation of anyone to a benefice for money gift or reward. By 13 Eliz. c. 6, s. 5, if any person for such consideration presents anyone to a benefice, the presentation will be void, and the crown may present for that turn; but this statute does not prevent the sale of an advowson or next presentation when there is a clerk in actual occupation of the living, even though he be *in extremis* at the date of the grant, unless the purchase is made with the intention of presenting some particular person. (See *Fox v. Bp. of Chester.*) But by 13 Anne, c. 2, a clergyman cannot purchase a next presentation with a view to presenting himself; but he may purchase an advowson, and even an estate for life in one, with such an intention. (See *Walsh v. Bp. of Lincoln.*) Further, 3 & 4 Vict. c. 113, s. 42, prohibits spiritual persons from selling or assigning any right of patronage or presentation vested in them by virtue of their office; and (28 & 29 Vict. c. 112) persons about to be instituted or collated

to any benefice, or licensed for a perpetual curacy, must make a declaration against simony.

In result, then, if a grant of an advowson is made when the benefice is vacant it will not carry with it the right to present for that turn, but the conveyance will be perfectly valid. (See *Alston v. Atlay*.) But a conveyance of the next presentation under similar circumstances is void. (*Baker v. Rogers*.) An advowson is real estate, and so descends to the heir, but the next presentation is personal estate, and so if the right to present has accrued before the death of the owner, and he dies before presenting, the right to present will devolve on his personal representatives, and not on his heir. (See *Bennett v. Bp. of Lincoln*.) So, also, if the next presentation is sold, and the purchaser dies before presenting, the right to present will pass to his personal, and not his real, representative. A grant of an advowson or next presentation is made by deed, with the usual covenants for title. Sometimes when the vendor of a next presentation is a tenant for life of settled estates, as it may happen that the right to present may not occur during his life, provisions are inserted in the grant for the repayment of the purchase-money in that event, or for the payment of interest on the purchase-money until the vacancy occurs: or the purchase-money is invested and the income paid to the purchaser. (*Smith v. Meredith*.) A person cannot grant an advowson reserving the presentation for his life, nor can he grant the glebe lands or tithes apart from the advowson as a distinct property. If the advowson belongs to joint tenants, the right to present will also belong to them jointly; if it belongs to coparceners, and they cannot all agree as to whom to present, the eldest of the sisters has the right to present on the first vacancy, the second on the next, and so on. Tenants in common must all join in making a presentation.

In connection with advowsons, you should bear in mind the law as to resignation bonds. On the presentation of a clerk the owner of the advowson may enter into an agreement with the clerk that the latter shall resign when called on by the former in favour of some specified person. But by 9 Geo. 4, c. 94, such an agreement or bond will be void unless it is conditioned that the resignation shall take place only in favour of *any one person named* (whether related to the patron or not), or in favour of one of two persons, but in this latter case both the nominees must be by blood or

marriage an uncle, son, grandson, brother, nephew, or grand-nephew of the patron, and further, in all cases one part of such bond must be deposited within two calendar months with the registrar of the diocese, and the resignation when made must refer to the agreement, and state the name of the person in whose favour it is made.

(9) *Grant of Easements.*

An easement may arise either of necessity (see *Corporation of London v. Riggs*), by prescription, or by grant, express or implied. When it is created by express grant, as it is an incorporeal right over real property, the instrument creating it must be a deed. The grantor of the easement generally covenants for title. Prior to the Conveyancing Act, 1881, when the owner of land wished to convey the land to a purchaser, and to subject it in his hands to an easement in favour of some third person, the only way in which he could accomplish his purpose, was first of all to grant the easement by one deed to that third person, and then by another deed to convey the land to the purchaser, subject to the easement so created. But now, by sect. 63 of that act, he can effect the same result by one deed only: for it provides that the conveyance of land to the use that any person may have, for an estate not exceeding in duration the estate conveyed in the land, any easement, &c. over that land, shall operate to vest the easement in that person. An illustration will make the effect of this section clear. Formerly, if A. wished to grant B. an easement, *e. g.*, a right of way over his estate Blackacre, and also wished to convey the land to C., he would first of all have to grant the easement to B., and then convey the land to C., subject to the easement, thus making use of two deeds. But, under this section, A. could now, by only one deed, grant Blackacre to C., to the use of C. in fee simple, and to the further use that B. might have a right of way over the land. This would vest the land in C. in fee, and the easement in B.

(10) *Conversion of Leaseholds into Freeholds.*

Sect. 65 of the Conveyancing Act, 1881, makes certain provisions for the conversion into freeholds of long leasehold terms, which are defined to mean terms which, at the time of their creation, consisted

of at least 300 years, and which have at least still 200 years to run, where there is no trust or right of redemption affecting the term in favour of the freeholder or other person entitled in reversion expectant on the term, and where there is either no rent at all, merely a peppercorn or other rent having no money value, or where the rent, having originally had a money value, has subsequently been released or become barred by lapse of time, or in some other way ceased to be payable. And by sect. 11 of the Conveyancing Act, 1882, the above section is to include the above terms, whether they have, as the immediate reversion therein, the freehold or not; but it is restricted, in that it is not to include (1) any term liable to be determined by re-entry for condition broken, or (2) any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

As to the mode which the act provides for the converting of such terms into fee simple estates, the following persons are designated by the act as the persons who may execute the deed by which the conversion is effected :—

1. The person beneficially entitled to possession of the land; if such person be a married woman, her husband must concur, unless she is entitled for her separate use;
2. The person in receipt of the income as trustee, or who has the term vested in him on trust for sale;
3. The personal representative of a deceased person in whom the term is vested:

Any of the above persons may, whether the term is subject to incumbrances or not, by deed declare that from and after the execution of the deed, the term shall be enlarged into a fee simple, and thereupon such term shall be so enlarged, and the fee will vest in the *person in whom the term* was previously vested. But the fee thus created will be subject to all the same trusts, powers, executory limitations over, rights, equities, covenants, provisions and obligations, to which the term was subject. These obligations, &c. will probably only mean those obligations to which the term was subjected by act of the parties, and not by act of law: so that the fee simple, when obtained, will, in addition to such obligations, become subject to all the obligations which by law are incident to a fee simple estate, but not to a term, *e. g.*, to dower and curtesy, &c. It is also provided that the fee simple, acquired under the

section, shall include the fee simple in all mines and minerals which have not at the time of the enlargement been severed or reserved from the land included, and this, even if the term was originally created *with impeachment of waste*.

Sub-sect. 5 of the section applies to the case where leaseholds have been settled by reference to the freehold land comprised in the same settlement, so as to go along with that land as far as the term permits. If such a term has, under the provisions of the settlement, become vested in any person absolutely, then he of course is a person who may under the description (1) above enlarge the term into a fee; but if the term has not become thus absolutely vested, then it is provided, that on its being converted into a fee, it shall (without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term) be conveyed and settled in like manner as the freehold land comprised in the settlement, and, until so conveyed and settled, shall devolve beneficially as if it had been so conveyed and settled.

It has been held under this section, that an annual rent of three shillings is not a rent having "no money value," so that a term subject to such a rent cannot be enlarged into a fee simple. (*Re Smith and Stott.*)

PART II.—MORTGAGORS AND MORTGAGEES.

CHAPTER I.

THE VALUE AND NATURE OF THE PROPOSED SECURITY.

It is not, strictly speaking, any part of your duty as a solicitor to advise a client who comes to you with instructions to you to prepare a mortgage as to the monetary or pecuniary value of the security upon which he proposes to lend his money. But it is advisable that you should know the views which courts of law have taken with reference to the value of securities, as he may ask your advice upon the subject; and again if he is a trustee it will, we think, clearly be your duty to look after his interests and see that he does not invest the trust funds beyond the amount which the courts have considered it is proper for him to lend.

If your client is the beneficial owner of the money which he proposes to lend, it will, perhaps, not be out of the sphere of your duties towards him if you ask him if he has had the land, offered as security, valued by a competent surveyor, and inform him that the result of practical experience is that it is not advisable to advance more than two-thirds of the estimated value of the property if it be freehold land, and only one half thereof if it be household property: and you may further point out to him that the risk of the security deteriorating in value depends much on the nature and locality of the property: thus there is more risk incurred in lending on mills and collieries and other property of like nature which it may be difficult to let or sell freely than on a property which from its nature is always likely to find a ready market. And if your client be a trustee proposing to invest trust funds you should make it a special point to ascertain that the pro-

perty on which he proposes to lend is of ample value, and that he does not advance a sum which falls but little short of the full value of the land. You should inform him that the result of many cases in the courts on the point is, that if through a deficiency in the security the trust funds or any part of them are lost the burden of proving that the security was of sufficient value will lie upon him. (See *Stickey v. Seicell*.) Here it was said: "To advance two-thirds is admitted to be within the ordinary rules of prudence; but this is when the property is of a permanent value as freehold land. The same rule does not apply to property in houses, which fluctuates in value and is always deteriorating." In *McLeod v. Annesly* it was admitted to be the practice of the court to consider that a trustee was justified in advancing to the extent of two-thirds of the value on agricultural freeholds, and "where there is a power to advance on house property, and there is a freehold house on which the money is to be advanced, to the extent of one-half." There is, however, no hard and fast rule on the subject. (*Re Godrey, Godrey v. Falkner*). But as to buildings used in trade, and so liable to great fluctuations in value, the trustee should not invest in these without leaving a large margin for depreciation. (See *Stretton v. Ashmall*.) Further, you should bear in mind that a trustee is not justified in lending on leaseholds without a special power to that effect. (*Fuller v. Knight*.) And long terms of years do not answer the description of "real securities" within the meaning of the power for trustees to lend on mortgage of real securities. (*Boyd's Settled Estates*.) And even then they should not advance more than one-half of the value, especially when the property is house property which has never been let. (*Hoey v. Green*.) Nor may they, unless authorized, advance on personal security even where they are empowered to invest the trust funds at their discretion (*Pocock v. Reddington*) or "on such good security as they can procure and think safe." (*Wilkes v. Steward*. See also *Stewart v. Sanderson*.)

But trustees may, in the absence of special powers, and unless they are specially prohibited, invest in real securities in any part of the United Kingdom. (See 23 & 24 Vict. c. 38, s. 11.) Trustees, too, should choose their own surveyor, and not leave him to be chosen by you: for should they leave the appointment of surveyor to you, and the security turn out insufficient, they will have to bear the loss. (*Fry v. Tapson*.)

Important questions affecting the value of the security may also arise when the person who proposes to *borrow* money is a trustee, and the security he offers is a mortgage of the trust estate. A trustee cannot so borrow money unless he is authorized to do so either by the trust instrument, by virtue of an express power or an implied one therein, or by statute. The implied power to borrow will arise when the real estate is charged with the payment of some charge or other, and the instrument specifies no express manner of raising a fund to satisfy that charge. Here a trustee or executor generally has an implied power to sell or mortgage. (See 22 & 23 Vict. c. 35, ss. 14, 15; Dart, V. & P. Vol. 2, 618.) In lending to a trustee or executor under such circumstances, you must note that you will have to rely on the security alone, and will have no remedy against the estate generally, and no personal remedy against the trustee or executor. Thus, where a bank lent money on mortgage to an executrix, and, she having overdrawn her account, the security turned out insufficient, it was held there was no general debt created against the testator's whole estate, and that the bank could not prove against it as a general creditor. (*Farhall v. Farhall*.)

As to the statutory powers of borrowing, Lord St. Leonards' Act (22 & 23 Vict. c. 35), by sects. 14 to 18, provides, as we have already seen, that in the case of a will where the real estate is charged with the payment of debts or legacies, and is devised to trustees for all the testator's interest, the trustees—and, where the estate is not so devised, the executors—may raise money to satisfy the charge by a sale or mortgage, and in this case the lender is exonerated from the necessity of seeing whether the powers conferred by the statute are duly exercised. Further, sect. 9 of Lord Cranworth's Act (23 & 24 Vict. c. 145) empowered the trustees to raise money when it is required for payments for equality of exchange or for the renewal of leases. This statute, however, is repealed; but powers are conferred by the Settled Land Act, s. 18, on the tenant for life to raise money for enfranchisement or equality of exchange or partition. Other statutes provide for the obtaining of money, by sale or mortgage of settled land, for the purpose of executing drainage works or effecting other improvements on the land.

If the lender is not protected by statute from the consequences

of not inquiring into the power of the trustee or executor to pledge the trust estate for a loan, or from inquiring into the necessity of raising money, or seeing that the money, when obtained, is applied to the proper purposes, he ought to ascertain by inquiries that such power exists and that it is properly exercised, and that the borrower is not contemplating a breach of trust. For if the trustee, on obtaining the loan, makes a wrongful application of the money to his own purposes, so as to cause a loss to the trust estate, your client will in most cases lose his money, the rights of the *cestui que trusts* being paramount to his rights, seeing that he has, by his neglect, put it in the power of the trustee to commit a fraud, and the equitable maxim being that, where it is a question which of two innocent persons shall suffer for a loss caused by the fraud of a third person, he must bear the loss who put it in the power of the third person to commit the fraud. The circumstances, then, under which the loan is applied for must be taken into account. If it be applied for, for instance, by an executor a long time after the decease of his testator, as it is only reasonable to presume that after a considerable lapse of time the testator's debts have all been paid, this will amount to sufficient notice to put you on inquiry whether any debts still *do* remain unpaid, and so whether there is any necessity for seeking the loan, and any power to give a *bonâ fide* mortgage for that purpose. (See *Burt v. Trueman*, *Satin v. Heap*, and *Re Tanqueray-Willaume*.) The result is, that your client may lose the benefit of his security if he incautiously lends money to a trustee or executor when the circumstances surrounding the transaction indicate or give rise to suspicions that he is not making the mortgage in *bonâ fide* execution of his powers, but with the design of applying the money he may obtain to his own purposes.

Another point of view from which to regard the value of the security is the nature of the tenure of the property proposed to be mortgaged. Considered thus, they may be said to rank in value in the following order:—1. Freehold land held in fee simple. 2. Freehold fee simple houses. 3. Copyhold land and houses. 4. Long terms of years where there are no burdensome covenants or heavy ground rents. 5. Property held in fee simple, but used for trade purposes. 6. Life estates. 7. Reversions and remainders. 8. Policies of life assurance. 9. Personal chattels.

Again, even where the property is a freehold estate in fee simple,

you must fully understand that it can be mortgaged more than once, and must clearly appreciate how inferior as a security is a second to a first mortgage. The disadvantages of a second mortgage may be enumerated as follows:—

- (1) You do not get the legal estate, and thus are exposed to the risk of tacking.
- (2) Other mortgages may in some cases be consolidated against you, for the right to consolidate still exists if sect. 17 of the Conveyancing Act, 1881, is excluded from the mortgage deeds or one of them.
- (3) You do not get the title deeds.
- (4) The first mortgagee may exercise his power of sale without consulting any but his own interests, and by selling at an inopportune time get but a low price for the estate, and so impoverish your security, and thus you may be compelled to redeem his mortgage in order to protect yourself.
- (5) It may turn out that you are not a second but a third or fourth mortgagee, in which case you will be postponed to every second or third mortgagee prior to you in point of time.

A few words as to the first, second and third of these disadvantages:—

We need do no more than remind you that the doctrine of tacking rests on the maxim that “Where the equities are equal the law must prevail,” and that under it a prior legal mortgagee by annexing to his security another which he holds on the same property for a subsequent debt, or an incumbrancer subsequent to the second mortgagee by getting in a prior legal security if he had no notice of an intervening mortgage, may tack the two sums lent together and, squeezing out as it were the intervening incumbrancer, is entitled to have both the charges satisfied before he can be compelled to relinquish the security in favour of the second mortgagee. Thus, A. mortgages his estate called Whiteacre to B., then to C., and then to D. D. subsequently buys up B.’s mortgage, and takes a transfer of the legal estate from him. D. can now, if at the time of advancing his money he had no notice of C.’s mortgage, tack the first and the third mortgages together, and thus squeeze out C.’s mortgage. (See the leading cases of *Marsh v. Lee* and *Brace v. The Duchess of*

Marlborough.) The doctrine depends entirely upon the recognition by equity of the power inherent in the legal estate, so that it is only he who has the legal estate, or at least the best right to call for it, who can exercise the privilege of tacking. Thus, as between merely equitable mortgagees, when none of them have the legal estate, there can be no tacking. With regard to tacking, the following points are worthy of note:—A third mortgagee who has advanced his money without notice of the second mortgage can take a transfer of the first mortgage and tack his own mortgage to it, even though he has prior to the transfer received notice of the second mortgage. (See *Marsh v. Lee*.) But if the first mortgagee has been paid off he becomes a trustee of the legal estate for the second mortgagee, and the third mortgagee, if he has notice of the second mortgage, cannot by taking a transfer of the legal estate from the ex-first mortgagee obtain priority over the second; for it is a breach of duty in the first mortgagee to convey the legal estate to the third, and the latter having notice of that breach will not be allowed to profit thereby. (See *Bates v. Johnson*.) There is another set of circumstances which operate favourably for a second mortgagee. This arises in cases such as the following:—B. by fraud obtains a mortgage from A., no money at all being lent to A. by him. B. subsequently, without A.'s concurrence, transfers this mortgage to C. Here C. would stand in no better position than B., and as no debt was due to B., so no debt passes to C., and C. would not be able to retain the land either against A. or any second mortgagee from him. (See *Parker v. Clarke*.) A first mortgagee can tack further advances made by him to his original debt, provided he has no notice of the second mortgage. (*Rolt v. Hopkinson*.) But a person who is a judgment creditor, and who afterwards advances money to his debtor on security of a mortgage, cannot tack his judgment debt to the mortgage debt. We may mention that tacking was abolished by the Vendor and Purchaser Act, 1874, but restored by the Land Transfer Act, 1875. And as to lands in Yorkshire, the doctrine of tacking is abolished as from the 1st January, 1885, by the Yorkshire Registry Act, 1884.

It is proper then, when your client is advancing money on a second mortgage, to inquire from the first mortgagee how much is due upon his security, and also, upon the completion of the affair, to give him notice that a second mortgage has been effected to

your client, which will have the effect of preventing him from tacking. The second mortgagee will still be exposed to the risk of the mortgagor making a third mortgage, and of this third mortgagee taking a transfer of the security of the first mortgagee without notice of the intervening incumbrance, in which case he will be able to tack the two securities as against your client.

In addition to the risk of being ousted by tacking, a second mortgagee runs a risk of having two or more securities consolidated against him. Consolidation, as you are no doubt aware, is a term used to express the right which a mortgagee, in whom there have become vested by transfer or otherwise several mortgages on different properties belonging to the same mortgagor, has to consolidate the several securities, *i. e.* to refuse the mortgagor or other person entitled to redeem to do so with regard to one of the mortgages alone, and the right to insist on the several properties being, as it were, lumped together and considered as one security for the sum total of the various amounts advanced upon each separate one of the same securities. As to this right you should consult the leading case of *Vint v. Padgett*. It was formerly held that notice of an intervening mortgage of the equity of redemption of one of the properties did not affect this right; but in the case of *Mills v. Jennings*, where one of the mortgages, which it was sought to consolidate, was not created till after the mortgagor had sold the equity of redemption of the estate owned by the person claiming to redeem, it was held that the purchaser could redeem the first mortgage without also redeeming the second. In effect, it was laid down that securities cannot be consolidated as against an intervening incumbrancer of one of the estates, except with regard to those mortgages which were in existence when the intervening incumbrancer became such. Consequently, if A. mortgages Blackacre to B. for 1,000*l.* and subsequently he mortgages Whiteacre to B. for 1,000*l.*, and then A. makes a second mortgage (or sale) of the equity of redemption in Blackacre to C., and subsequently A. mortgages Greenacre to B. for 1,000*l.*, if C. wishes to redeem Blackacre B. can compel him also to redeem Whiteacre as well, for the mortgage of that estate was in existence when C. acquired the right to redeem Blackacre, and he took subject to all subsisting equities; but B. could not in such a case compel C., though he might have compelled A., to redeem also Greenacre,

because Greenacre was not in mortgage to B. when C. acquired the equity of redemption in Blackacre. Furthermore, in *Cummins v. Fletcher*, another limitation was put to the doctrine of consolidation by the establishment of the rule that a mortgagee cannot consolidate securities unless there is a default in payment of the money secured as to both of the mortgages. (See also *Chesworth v. Hunt*, *Harter v. Colman*, and *Re Raggett, Ex parte Williams*.)

There is not now, however, so much to be feared by a second mortgagee from the risk of an adverse consolidation, for by sect. 17 of the Conveyancing Act, 1881, it is provided that a mortgagor (which includes any person entitled to redeem, and *inter alia* a second mortgagee) may, when seeking to redeem any mortgage, do so without paying any money due under any separate mortgage made by him or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. This section does not abolish the doctrine of consolidation altogether for the future, for there are saving clauses in the section by which it will still be applicable, viz. :—(1) Where both or all the mortgages are made before the commencement of the act; and again (2), the section will only apply if and so far as a contrary intention is not expressed in the mortgage deeds or one of them. Consequently the risk of consolidation is one which must always be run by a second or subsequent mortgagee. And in spite of the section it has been held that where a foreclosure action is brought with regard to mortgages of two distinct estates, the costs of the action must be paid before the mortgagor can redeem either mortgage. (*Clapham v. Andrews*.)

The third objection to a second mortgage is that the mortgagee does not get the title deeds. The inconvenience of not having these in your custody or power is obvious. Not only are you exposed to risk from fraud by the first mortgagee and the mortgagor, but not having legal evidence of your charge on the estate other than your own mortgage deed your security is clearly depreciated in value.

CHAPTER II.

THE MORTGAGE DEED.

I. The Title of the Mortgagor.

WE will now suppose that your client has satisfied himself of the value of the property and the desirability of advancing money upon it, and has instructed you to do all that is necessary to procure a mortgage of it, to be made to him by the proposed borrower. Your first duty will, as upon a sale, be to investigate the title of the mortgagor. In doing so you should, if anything, be more strict in your inquiries and requisitions than you would be upon a sale; for the sole object of the mortgagee is to obtain a thoroughly safe security for his advance, and he should be induced to lend on nothing but an unimpeachable security. A purchaser may have some particular fancy, whim, or taste to gratify in acquiring any particular plot of land; and so long as he gets what he desires, with a reasonably probable assurance that he is not likely to be disturbed in the possession or enjoyment of the land, may be content to accept a title which is not altogether above suspicion. But a mortgagee is not influenced by any such motives. He does not want the land, and however great its attractions may be they have no concern for him. What he wants is something on which he can confidently rely for repayment of the money he lends, in case the mortgagor does not repay him, as it were, out of his pocket. In making these preliminary investigations into the title, you may be as strict in your requirements as you like. The mortgagor is at your mercy in this respect, for there will be no conditions or contract to limit your free right to call on him to show any length of title whatever, and to verify it in the clearest way possible. Neither is your power to insist on the strictest proof controlled in any manner by statute, for the 2nd section of the Vendor and

Purchaser Act, 1874, does not apply to negotiations for mortgages, but only to sales, strictly so called, and in consequence you are quite at liberty to call for the production of a longer title than a forty years' one. Nor does sect. 3 of the Conveyancing Act apply to mortgages. If you are dissatisfied with the mortgagor's replies to your requisitions, or if he refuses to comply with any of your requirements, all you have to do is to withdraw from the matter and refuse to lend him the money. In short, all which we have said in a previous page as to your duties with respect to the investigation and proof of title upon a purchase will apply equally to negotiations preliminary to an advance of money on mortgage, with the exception that there is nothing to fetter your strict legal rights to have a good title deduced to you and fully proved to your satisfaction by the mortgagor at his own expense, unless indeed, by any contract made with the mortgagor, you have deprived yourself of these rights.

II. The Preparation of the Mortgage Deed.

It will next be your duty, as the proposed mortgagee's solicitor, to prepare the mortgage deed. We shall presume that you are fully conversant with the ordinary form and usual contents of a mortgage security, and shall not therefore feel bound to analyse these in detail. We will merely call your attention to some of the most important points which you ought to have clearly before you when preparing the draft, and especially we would direct your notice to the important bearing which the Conveyancing Act, 1881, has upon the subject.

(1) *The Covenant for Repayment of the Loan and Interest.*

The first points upon which we shall have observations to offer will be those connected with the covenant for the repayment of the money lent with interest thereon. The effect of this covenant is to convert the loan from a simple contract debt into a specialty debt. Formerly, two advantages flowed from effecting this conversion; first, it gave the mortgagee, as a specialty creditor, priority over the mortgagor's simple contract creditors in the administration of

the debtor's estate. But this advantage was taken away by 32 & 33 Vict. c. 46, by which creditors, whether simple contract or specialty creditors, are all put on the same footing in administration as regards priority when the debtor dies on or after the 1st of January, 1870. The other advantage was, that though under a foreclosure decree only six years' arrears of interest could be recovered, under the covenant the mortgagee could recover twenty years' arrears, and though the remedy against the land were lost by lapse of time, the remedy under the covenant remained. (See *Hunter v. Nockdale*.) But this advantage has also been in part taken away by the effect of recent cases: for in the case of *Sutton v. Sutton*, it was held that under the Real Property Limitation Act, 1874, an action to recover any money secured by mortgage must be brought within twelve years, and that this was the case whether there was a covenant for repayment in the mortgage or not. And in *Fearnside v. Flint* it was held that it made no difference that the covenant for repayment was contained in some separate instrument from the mortgage, as in a collateral bond by the mortgagor, but that the above rule still applied even in this case, and the action to recover the money secured, both by the mortgage and the collateral bond, must be brought within twelve years, for the action still practically remained one to recover mortgage money within sect. 8 of the Act of 1874. The covenant, however, still retains this advantage, that it enables you to recover twelve years' arrears of interest, whereas, if it were left a mere simple contract debt, you would only be able to recover six years' arrears.

The mortgagee may sometimes wish to make punctuality in payment of the interest of advantage to the mortgagor, and to do so, to provide that if he does not pay it punctually at the time stipulated, he shall be bound to pay interest at a higher rate. He cannot do this directly; for if he inserted a condition that the interest should be payable after the rate of 5 per cent., but, if it was not paid punctually on the date fixed for payment, then it should be 6 per cent., equity would regard this condition in the light of a penalty, and would relieve against it by allowing the mortgagor to redeem on repayment of the principal and 5 per cent. But the same object may be effected by stipulating that the rate of interest shall be 6 per cent., but that, if it is paid punctually, payment at the rate of 5 per cent. will be accepted. It has been held under such

a stipulation that the mortgagee will be entitled to interest at the higher rate, even if he has gone into possession through the default of the mortgagor, and received the rent of the mortgaged premises before the day fixed for the payment of the interest. (*Union Bank v. Ingram.*)

In spite, however, of the doctrines of equity as to penalties, it has been recently held, in *The General Discount Co. v. Glegg*, that a commission payable in case of instalments of a loan being overdue might be recovered.

It is doubtful whether or not compound interest can be reserved by a mortgage, so as to charge the land. The old rule was that it could not be so reserved; but from the decision in *Clarkson v. Henderson*, it would appear that it may be.

Sometimes the covenant to repay is extended, not only to the actual money lent at the time of the execution of the mortgage, but also to advances to be made on some future occasion.

In these cases it is not the practice to state expressly the total amount beyond which these advances shall not be extended, but the mortgage deed is so stamped as to cover a certain sum in excess of that advanced at the time of execution. Sometimes, also, provisions are inserted for continuing the loan for a time certain. As a rule the mortgagee, as you know, can call in his money upon giving a certain notice, and where it is wished that he shall not have this power, or at least have it only in a limited manner, it is usual to make the money payable in the first instance at the ordinary time, *i.e.* six months after the execution of the deed, but to provide that the mortgagee shall not call in his money before the expiration of the term agreed on, if meanwhile the interest be punctually paid and the mortgagor's covenants duly performed, and, further, that the mortgagor shall not be at liberty to pay off the money before the end of that term, unless the mortgagee agrees to accept it. (See *Prideaux*, 13th ed., vol. 1, p. 464.) Again, provision is sometimes made for the repayment of the advance by instalments. In this case, as in the last, it is the practice to make the money payable at the usual time, and then to add a proviso that if the instalments be paid punctually on certain days, with interest on the part the mortgagee will not call in the part which is not off. Or else the covenant may be, in the first case, to pay off by instalments, and the proviso for redemption.

makes the premises redeemable on the payment of the advance and interest in the manner mentioned in the covenant, and this is followed by a proviso giving the mortgagee power to call in all the money secured in event of the instalments and the interest not being duly paid. The case of several trustees advancing money out of funds owned by them upon a joint account formerly modified the form of covenant, and made it necessary to insert what was called the "joint account clause." The reason for this was, that when several persons advanced money, though they might be joint tenants at law, they were considered as tenants in common in equity of the mortgage debt; so that, on the death of one of them, the mortgagor, on paying off the debt, had to go for a discharge to not only the survivors, but the personal representatives of the deceased person. This was very inconvenient, and the inconvenience was specially felt in the case of trustees, who form a large proportion of the class of persons who lend on mortgage. It was not a feasible plan to show on the face of the mortgage deed that the lenders were trustees, and that the survivors of them had the power to give receipts, for this would amount to giving general notice that the money was trust property, and so the title deeds relating to the trust would have been incorporated into the title of the mortgagor. To avoid the necessity of stating on the deed that the lenders were trustees, it was the usual practice to insert in the deed a declaration that the money belonged to them upon a joint account, and to provide that the survivor or survivors of them, or the executors or administrators of the survivor, their or his assigns, should be able to give a receipt, which would act as a valid discharge. Though the mortgage deed is not as a rule executed by the mortgagees, and thus the trustees could not be properly said to make the declaration, it is the best opinion that such a declaration would nevertheless be binding on them. (See *Burnett v. Lynch*.) But now by the Conveyancing Act, 1881, s. 61, in a mortgage made after the commencement of the act, when the sum advanced is expressed to be advanced by more persons than one out of moneys belonging to them on a joint account, or where the mortgage is made to more persons than one jointly and not in shares, the mortgage money is to be deemed to belong to them on a joint account as between them and the mortgagor, and the receipt in writing of the survivor or of the last survivor will be a good dis-

change to the payer even though he has notice of a severance of the joint account. The result is that you may omit all reference to the fact that the money is advanced out of moneys so owned; but it seems still to be the practice to insert at least the words in the covenant for repayment in the testatum "out of money belonging to them in a joint account."

In connection with persons lending money jointly we may take the opportunity here of mentioning that prior to the Conveyancing Act, 1881, these persons were seldom mentioned in the deed without their names being followed by the words "or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns." The object of this repetition was to make it clear on the face of the deed that the benefit of the provisions in the deed was to survive. But now by that act (s. 60), with regard to covenants with two or more to do any act for their benefit, it is enacted that they are to be deemed to include an obligation to do that act for the benefit of the survivors or survivor of them, or of any other person to whom the right to sue on the covenant devolves, unless a contrary intention appears.

The Conveyancing Act, 1881, has another effect on the form of the covenant, as we have already pointed out in a previous page. This is to enable you to omit all mention of the heirs, executors and administrators of the covenantor or covenantee. (See ss. 58 and 59, *ante*, p. 159.) Further, the indorsed receipt may now be omitted, just as it may be omitted upon a conveyance on sale. (Conveyancing Act, 1881, s. 54, *ante*, p. 149.)

(2) *The Proviso for Redemption and herein of Foreclosure.*

What is known as the proviso for redemption is, in modern mortgages, not strictly speaking a proviso for redemption at all, but a proviso for reconveyance. In older mortgages this proviso was to the effect that the conveyance should be avoided upon the payment of the money secured; but the usual practice of the present day is to provide that upon the mortgage money and interest being paid off the mortgagee will reconvey the premises to the mortgagor or as he shall direct. Formerly, too, this proviso stipulated that the reconveyance should be made by the mortgagee, his heirs or assigns; but it is now unnecessary, and indeed improper,

to insert the word "heirs;" for by the Conveyancing Act, 1881, s. 30, it is enacted that on the death of a sole mortgagee, whether testate or intestate, the mortgaged premises will vest in his legal personal representative, like a chattel real, so that in no case will the heir have power to execute the reconveyance. And even if the mortgagee make a will, devising the premises to a devisee, the statute will still prevail, and they will vest, as before, in his legal personal representative. Another point to note on the wording of this proviso is that formerly the mortgagor could insist upon nothing more than a reconveyance, strictly so called, under it. He could not require the mortgagee to make a transfer of the mortgage to some third person on being paid off. (*Dunstan v. Patterson.*) On this account it was usual to add the words "or as he" (the mortgagor) "shall direct." But it is now unnecessary to make this addition; for by sect. 15 of the Conveyancing Act, 1881, it is provided that where the mortgagee is not and has not been in possession he may require the mortgagee not merely to execute a reconveyance to him, but to join in a transfer of the mortgage debt and securities to some third person, at the discretion of the mortgagor, and the mortgagee is bound to concur in the transfer. Under this section a question arose whether the terms of the section would enable a mortgagor or an incumbrancer to insist on a transfer when there were intermediate incumbrances. For instance, if A. mortgaged his property to B., and subsequently mortgaged the equity of redemption to C., and then again to D., it is clear that C. could compel a transfer, but could A. or D.? This question arose in *Teeran v. Smith*. To put an end to all doubt on the point it was enacted by sect. 12 of the Conveyancing Act, 1882, that the right of the mortgagor, under sect. 15 of the Act of 1881, to insist on a reconveyance should belong to and be capable of being enforced by each incumbrancer and by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer is to prevail over the requisition of the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer is to prevail over the requisition of a subsequent incumbrancer.

If the property mortgaged is in settlement the proviso should provide that it shall be reconveyed to the uses subsisting under the settlement. Sometimes a question arises on a reconveyance whether it has been the intention, as appears from the proviso, that

the reconveyance shall be made to some other persons or for some different estate or interest from the person, or the interests, entitled to the property or subsisting therein at the date of the mortgage. If it is intended to make such an alteration the intention to do so should be clearly expressed in the deed. If this is not done, but the difference of limitation in the proviso for reconveyance can be explained as a mistake or oversight, or in any way as not intentional, then, in spite of the proviso, the reconveyance will be made so as to vest in the mortgagor the same estate or interest as he had at the date of the mortgage. Thus, if the mortgagor is an owner in fee, and the proviso for reconveyance provides that the reconveyance shall be made to the mortgagor and the heirs of his body, the property will, nevertheless, be reconveyable to him in fee. (See *Innes v. Jackson*.) But if the intention to alter existing uses is evident and clearly the result of intention, then the intention will prevail. (*Anson v. Lee*.) These questions often arise in cases where lands belonging to a wife are mortgaged to secure debts due from her husband to some third person. The rule is that when this is done, and the equity of redemption is reserved to the husband and his heirs without any further expression of intention to alter the previous rights, the equity of redemption will result to the wife. But if the mortgage is for a term of years, and the proviso for redemption directs that the property shall be reconveyed upon payment to the husband or to uses other than to the wife, then the equity of redemption would belong to the husband or other person named. (See *Jackson v. Innes*; *Jones v. Davies*; *Re Belton's Estate*.) But the intention must, as we said before, always be clearly expressed. (See *Meek v. Chamberlain*.)

We must now consider for a moment what persons have the right to redeem. This right belongs not only to the mortgagor and the persons specially endowed with it by the provisions of the mortgage deeds, but also to all persons claiming under the mortgagor, and all persons having any interest in the equity of redemption. This will include the mortgagor's heir, but not his personal representatives, as such (*Cattly v. Simpson*), purchasers of and mortgagees of the equity of redemption, trustees in bankruptcy, and judgment creditors of the mortgagor, and sureties for the payment of the mortgage debt. As to redemption by sureties, it was formerly held, that if the mortgagee made a further advance

to the mortgagor on the security of the property, the surety could not redeem without paying off the further advance as well as the sum originally lent; but this is not now the case, but he may redeem on paying the amount for which he stands surety, and on doing so, is entitled to the benefit of the security taken by the mortgagor, whether or not the creditor has made further advances. (See *Forbes v. Jackson*.) If the equity of redemption is settled, the right to redeem belongs to the tenant for life in preference to those entitled in remainder. (*Ravald v. Russell*.)

But it should be remembered that the mortgagor may forfeit his right to redeem; for by 4 & 5 Will. & Mary, c. 16, it is enacted, that when a person, having once mortgaged, mortgages again, with intention to defraud, without discovering the first mortgage to the second mortgagee, he will have no right to relief or equity of redemption as against the second mortgagee, who will be able to hold the land free from the equity as fully as if he had purchased the land. But this statute is construed very strictly, so that it has been held that an equitable mortgage by deposit of title deeds, and a further charge without a proviso for redemption are not second mortgages within the meaning of the act. (See *Kenard v. Futvoye*.)

Before exercising the right to redeem, the mortgagor must give the mortgagee six months' notice of his intention to do so; and by 37 & 38 Vict. c. 57, s. 7, the action to redeem must be brought within twelve years after the time when the mortgagee has obtained possession or receipt of the land, or the rents and profits thereof, unless some acknowledgment of his right to redeem has been given to him in the meantime by the mortgagee in writing, when the action must be brought within twelve years after the date of such acknowledgment. No additional time is allowed for disability. (*Kinsman v. Rouse* and *Forster v. Patterson*.) With regard to actions for redemption it will not be out of place to remind you that 15 & 16 Vict. c. 86, s. 48 (which empowered the court in a foreclosure action to direct a sale instead of a foreclosure at the mortgagee's request) did not apply to actions for redemption; but now by the Conveyancing Act, 1881, s. 25, in an action either for foreclosure or redemption, *inter alia*, any one entitled to redeem may obtain an order for sale instead of redemption, and this whether the action is for sale alone, or for sale and redemption in the alternative. (See hereon *Clarke v. Pannell*.)

Finally, we may remark that one of the most characteristic remedies of the mortgagee to recover his principal and interest is the right to foreclose the equity of redemption. This foreclosure is obtained by bringing an action (it may be brought at any time after the day named for payment in the mortgage deed), claiming that an account shall be taken of what is due under the mortgage, and asking the court to name a time at the end of which, if the money found to be due is not repaid, the mortgagee shall be foreclosed from his equity of redemption. The time fixed is generally six months after the date of the foreclosure decree, and if (but it may be enlarged in certain cases) at the end of the time so limited, the money is not paid off, then the decree is made absolute, and the result is, that the mortgagee becomes absolute owner in equity as well as at law of the mortgaged property. As we have seen, the court may now order a sale in lieu of a foreclosure on the request of the mortgagee or any person interested in the mortgage money, notwithstanding the dissent of any other person, and in spite of the fact that the mortgagee does not appear in the action, and without allowing any time for the repayment of the mortgage money. (Conv. Act, 1881, s. 25.) This right of foreclosure is incident to a mere equitable mortgage by deposit, with or without memorandum in writing. (*Backhouse v. Charlton* and *Oldham v. Stringer*.) It does not extend to a pledge of personal chattels, *e.g.*, a deposit of bonds not transferred, the remedy in this case being by sale. (*Carter v. Wake*.) But it will be available in cases of a security on shares with power of sale under which the shares are transferred to the lenders. (*General Credit and Discount Co. v. Glegg*.)

The section further empowers the court to order a sale in any action (whether for foreclosure, redemption or sale), at the request of the mortgagee or anyone interested in the mortgage money or right of redemption, and that, notwithstanding the dissent of any other person, or the non-appearance in the action of the mortgagee, or of any person so interested, and without allowing time for redemption or repayment of the mortgage money. This is a far more extensive provision than that contained in 15 & 16 Vict. c. 86. For example, under that act it was only by consent of *all parties* that an immediate sale could be directed (*Wigham v. Measor*), though sometimes an immediate sale was ordered in spite of the mortgagor's objections. (*Fowler v. Harrey*.)

Now the court can make the order, notwithstanding the dissent of any person or the non-appearance of the mortgagee or of the mortgagor, and without allowing the ordinary time for redemption. Sub-sect. 4 contains a similar provision to that contained in 15 & 16 Vict. c. 86, that the court may order a sale without previously determining the priorities of incumbrancers; and sect. 3 puts a limit to the feasibility of the mortgagor or person interested in the redemption obtaining a sale, by providing that the defendant, whoever he may be, may apply to the court, and the court may order the plaintiff to give security for costs, and may give the conduct of the sale to a defendant.

In *Manchester and Salford Bank v. Sowcroft*, Chitty, J., decided that when in a foreclosure action a sale is ordered, the defendant is the right person to have the conduct of the sale, as he is interested in obtaining a larger price than the plaintiff.

In *Weston v. Davidson*, and in the *Union Bank of London v. Ingram*, sale was ordered after interlocutory and before final decree for foreclosure; but in the former case the applicant was ordered to pay 150*l.* into court as security to meet the expenses.

In *Wade v. Wilson* the court held that in a foreclosure action an immediate order for sale would not be directed where there was a second mortgagee who had not appeared in the action, but that the proper course in such a case was to direct an account to be taken of what is due to the plaintiff, and order so much only of the property to be sold as would be sufficient to pay the plaintiff. (As to the compulsory nature of the provisions of sect. 25 of the Conveyancing Act, 1881, see *Clarke v. Pannell*.)

The section applies to actions brought either before or after the commencement of the act.

(3) *The Covenants.*

After the proviso for redemption follow the covenants. In an ordinary mortgage these comprise (1) covenants by the mortgagor for title; (2) covenant to insure; (3) to keep in repair.

(1) *As to the Covenants for Title.*—These need not now be expressly inserted in the deed, for they are, by the Conveyancing Act, 1881, impliedly incident to it under the same circumstances

under which such covenants are incident to purchase deeds. (See *ante*, p. 157.) That is to say, they will be annexed to the deed when the mortgagor expressly conveys as beneficial owner.

In conveyances by way of mortgage, the covenants which the act implies are of course different from the covenants implied in deeds of grant, but they are the ordinary four covenants usually inserted in mortgages, viz., *absolute* covenants for right to convey; for quiet enjoyment; if default is made in payment of the money secured, or the interest thereon at the proper times; free from incumbrances, and for further assurance, at the cost of the mortgagor so long as any right of redemption exists, and afterwards at the cost of the party requiring the further assurance. If the mortgage is of leasehold property, a further covenant is implied similar to that additionally implied in case of a sale of leaseholds—i. e., that the lease is a valid and subsisting one, and that the rent and the lessee's covenants and conditions therein have been performed and observed; and further, a covenant is implied on the part of the mortgagor to pay the rent and observe the lessee's covenants and agreements as long as any money remains owing on the security of the mortgage, and to indemnify the mortgagee and those deriving title under him therefrom.

(2) *As to the Covenant to Insure.*—A power to effect insurance is made incident to mortgages by the Conveyancing Act, 1881. The power supplied by sect. 19 (ii) is a power at any time after the date of the mortgage deed to insure and to keep insured against loss or damage by fire, any building or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property in addition to the mortgage money, *and with the same priority*, and with interest at the same rate as the mortgage money.

But an insurance is not to be effected under this power—

- (1) Where there is a declaration in the mortgage that no insurance is required.
- (2) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed. (Under Lord Cranworth's Act, a mortgagee could effect an insurance when the principal money had remained unpaid

for twelve months, even although the mortgagor kept up an insurance in conformity with the terms of the mortgage deed.)

3. When the mortgage deed contains no stipulation as to insurance, and an insurance is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is by the act authorized to insure.

The section further provides that the mortgagee may, at his option, require the mortgagor to apply the moneys received under an insurance, effected either under the mortgage deed or the statutory power, in making good the loss or damage in respect of which the money is received, or (without prejudice to any obligation imposed by law or by special contract), in discharge of the money due under the mortgage. The last provisions prevent many questions arising as to the application of the insurance money in case of damage by fire, and contain similar conditions to the stipulation usually contained in the ordinary common form covenants to insure. The "obligations imposed by law" refer to the stat. 14 Geo. 3, c. 78, by which the insurance office may, at the request of any person interested in the building burnt down, or on any suspicion of fraud, cause the insurance money to be expended in repairs, unless the party insured, within sixty days after the adjustment of the claim, gives security that the money shall be expended, or the money is at the time disposed of to the satisfaction of all parties.

As to the amount in which the act authorizes the mortgagee to insure under the power, sect. 23 provides that it shall not exceed the amount, if any, specified in the mortgage deed; or, if no amount specified, two-thirds of the amount which would be required, in case of total destruction, to restore the property insured.

The advisability of relying on this power to insure has been doubted by some conveyancers, the objections to it being that— (1) The mortgagor may have insured to the amount in which the mortgagee is empowered to insure by the act, and if the mortgagee then insures he will not be able to charge the premiums on the property. (2) On the other hand, if the mortgagee does not insure, it may turn out that the mortgagor has not so insured, in which case there would be a loss in case of fire. (3) Again, the

mortgagee has no personal claim against the mortgagor for premiums paid by him (the mortgagee) in case of the mortgagor's default. All he can do is to add them to his principal debt.

(4) The act limits the amount of insurance. The result would seem to be that, if it is intended that the mortgagor should effect the insurance, an express power should be given to the mortgagee to insure in default; but if the mortgagee intends to insure himself he may rely on the statutory power, extending it, however, by a clause mentioning the amount in which he may insure, and empowering him to insure notwithstanding any insurance by the mortgagor. (See Sweet's Conveyancing, p. 575.)

(3) *As to the Covenant to Repair.*—This is not affected by the Conveyancing Act, and should generally be expressly inserted.

After the covenants come powers to the mortgagee—To sell the property; to appoint a receiver; to cut and sell timber; to grant leases; and in suitable cases the mortgage deed follows with an attornment clause. Each of these must be discussed in turn.

(4) *The Power of Sale.*

This power gives to the mortgagee one of the most important of his remedies. Before the passing of Lord Cranworth's Act (23 & 24 Vict. c. 145), this power had always to be expressly inserted, but by that act such a power was made incident, under certain circumstances, to every mortgage executed after the 28th August, 1860. But this provision is now superseded by the Conveyancing Act, 1881, which, in sects. 19—25, make certain provisions as to the power of the mortgagee to sell, to insure, to appoint a receiver, and to cut and sell timber. Of the power to insure we have already spoken. As to this, as well as the others, the Act provides that the mortgagee shall have these powers where—(1) The mortgage is made by deed; (2) the provisions of the act are not excluded by the expression of contrary intention; and (3) the deed is executed after the 31st December, 1881.

The power of sale becomes exerciseable *when the mortgage money has become due*. But no sale is to be made—

- (a) Until after *three months' notice requiring payment* has been given to the mortgagor, or

- (b) Some interest has been in arrear *two* months, or
- (c) Until after breach has been committed of some provision contained in the mortgage other than a covenant to pay the mortgage money or interest.

It would seem that subsequent mortgagees are "mortgagors" within this section, so notice should be given to such mortgagees. (See *Howe v. Smith*.) The notice requiring payment of the mortgage money, where necessary, must, by sect. 67 of the act, be in writing, and must be given to the mortgagor, or, if there are more than one mortgagor, to any one of them. As to the mode in which this notice may be served, it is provided by sect. 67 that—

- (i) The notice shall be sufficient although only addressed to the mortgagor by that designation without his name, or generally to the persons interested without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn or unascertained.
- (ii) It will be sufficient service of the notice to leave it at the last known place of abode or business in the United Kingdom of the mortgagor, or to affix it or leave it for him on the land, or any house or building comprised in the mortgage.

Again, service may be effected by sending the notice by post in a registered letter addressed to the mortgagor *by name* at the aforesaid place of abode or business, office or counting-house, if the letter has not been returned through the post-office undelivered.

By sect. 21 a mortgagee, exercising the power of sale, is empowered to convey the property "for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, &c. which have priority to the mortgage." That is, the mortgagee can only convey the exact estate which is comprised in his mortgage, and put the purchaser in exactly the same position which he occupied, but freed, of course, from the possibility of being redeemed.

By the same section, a purchaser, who takes a conveyance made in professed exercise of the power of sale conferred by the act, gets

a title which cannot be impeached on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised. But any person who is damnified by an unauthorized, improper or irregular exercise of the power is to have indemnity in damages against the person exercising the power.

Sect. 21 prescribes the manner in which the proceeds of the sale are to be applied. This is as follows:—

- (i) Prior incumbrances, to which the sale is not made subject, are to be discharged and the balance applied—
- (ii) In payment of the proper costs of sale, or attempted sale.
- (iii) In discharge of the mortgage money and of any interest and costs or other money, if any, due under the mortgage.
- (iv) And the residue is to be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

The same section (sect. 21) also makes the following provisions:—

The power of sale may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money. (This includes the mortgagee, his executors, administrators and assignees or transferees.)

The power of sale conferred by the act is not to affect the right of foreclosure. (This provision seems hardly to be necessary, as the act contains nothing to take away or modify the right to foreclose.)

The mortgagee, his executors, administrators or assigns are not to be answerable for any involuntary loss happening in connection with the exercise of the power of sale.

At any time after the power of sale has become exerciseable, the person entitled to exercise the same may recover the title deeds from any person who has them, except a person who has an estate, interest or right in the mortgaged property entitled to priority over the mortgage.

And finally, by sect. 22, it is provided that the receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by the act, and that the person paying the same shall not be concerned to inquire whether any

money remains due under the mortgage. The first part of this section was, perhaps, unnecessary, as the joint effect of sect. 23 of 22 & 23 Vict. c. 35, of sect. 29 of 23 & 24 Vict. c. 145, and of the 36th section of the Conveyancing Act, 1881, is to make the written receipts of trustees and mortgagees good discharges.

(5) *The Power to appoint a Receiver.*

This power, though arising when the mortgage money becomes due (sect. 19), is not to be exercised until the mortgagee has become entitled to exercise the statutory power of sale (sect. 24). When this power of sale becomes exerciseable has been already pointed out. (See *ante*, p. 218.)

The appointment is to be in writing under the hand of the mortgagee, who may (subject, of course, to the terms of the mortgage deed on the point, if any), appoint anyone he likes to be the receiver. The remaining part of sect. 24 defines the position, powers and remuneration of the receiver, and we shall merely give a short summary of them.

- (i) The receiver is to be deemed the agent of the mortgagor, who is to be responsible for the receiver's acts and defaults, unless the mortgage deed otherwise provides.
- (ii) The receiver is empowered to recover the income of the property in any manner, and in the name of either the mortgagor or the mortgagee, and to give effectual receipts.
- (iii) Persons paying money to the receiver are protected in case of his not having authority.
- (iv) The receiver may be removed and a new one appointed by writing under the hand of the mortgagee.

The receiver may retain, out of moneys in his hand, his commission, which is to be at the rate specified in his appointment, not, however, exceeding 5% per cent. on the gross amount of money received; or, if no amount is specified, then at the rate of 5% per cent. on such gross amount, or at a higher rate if the court allows it.

The receiver, if so directed (in writing) by the mortgagee, is to effect insurance of the property out of the moneys received by him.

The receiver is to apply moneys received by him as follows:—

- (a) In discharging rents, taxes and other outgoings;
- (b) In keeping down annual sums and other payments and interest on all principal sums having priority to the mortgage;

- (c) In payment of his commission and the premiums of insurance payable under the mortgage deed or this act, and the cost of necessary or proper repairs directed to be done in writing by the mortgagee;
- (d) In payment of interest accruing due in respect of any principal money due under the mortgage;
- (e) In payment of the residue to the person entitled to receive the income of the property, subject to the receiver's right to do so.

Acting for a mortgagor it would be your duty to endeavour to vary this statutory power of appointing a receiver by providing that the receiver, if appointed without the consent of the mortgagor, should be the agent of the mortgagee and not of the mortgagor.

The last power which this section gives to a mortgagee is,

(6) *The Power to cut and sell Timber.*

This is a power to the mortgagee *while in possession* to cut and sell timber and other trees ripe for cutting, not being ornamental ones, and also to make contracts for the cutting and sale of the same, provided such contracts are to be completed not later than twelve months from the making thereof. This power is an entirely new one, and was not mentioned in Lord Cranworth's Act. The law formerly existing, as laid down by the courts, was, that a mortgagee in possession could not waste the estate (*Hanson v. Derby*), and if he proceeded to fell timber the court would, on the mortgagor's application, decree an account and order the produce of the timber to be applied in payment of interest in arrear, if any, and then in reduction of the principal. And, again, the mortgagor could obtain an injunction to prevent the mortgagee felling timber, unless the security was defective. In this case the mortgagee would not be restrained; but, of course, the produce of the sale of the timber was applied in reduction of the money due under the mortgage. (*Witherington v. Bankes*.) Under the new act, the mortgagee, while in possession, may apparently cut and sell timber, or contract for its sale, whether the security is or is not insufficient, and cannot be restrained by injunction on the ground that the security is sufficient; and though there is no express direction as to what is to be done with the proceeds of the sale, they must

presumably be applied in reduction of the interest and principal secured by the mortgage.

Now with regard to the whole of these powers which we have just been discussing—the powers to sell, to insure, to appoint a receiver, and to cut timber—it is provided by sect. 19, sub-sect. 2, that they may be varied or excluded by the mortgage deed, and as so varied or excluded shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the act. And, again, sect. 19, sub-sects. 3, 4, declare these powers are only to become applicable if and so far as a contrary intention is not expressed in the mortgage deed, and subject to its terms and provisions, and that they only apply where the mortgage deed is executed after the commencement of the act, *i.e.* after the 31st December, 1881.

(7) *The Power to grant Leases.*

We next come to the powers to grant leases. Before the passing of the Conveyancing Act, 1881, the state of the law on the subject was as follows—(1) As to the mortgagor—as he is only a tenant at will to the mortgagee he could not make a valid lease so as to bind the mortgagee, and if he did make one, the mortgagee could eject the lessee without notice. (*Keech v. Hall.*) And (2), as to the mortgagee, though he is legally the owner of the property, he could not, without an express power, grant leases which would be binding in equity on the mortgagor, that is to say, the mortgagor could, on redeeming the property, eject the tenant. So that, practically, when property was in mortgage, the only way in which a valid and binding lease could be granted was, by the mortgagor and mortgagee both joining in the lease, or by virtue of an express power of leasing, which was often inserted in mortgages comprising an extensive property. The Conveyancing Act, 1881, sect. 18, now enables either the mortgagor (being in possession) or the mortgagee (being in possession) alone to make demises of the mortgaged land, and to execute and do all assurances and things necessary or proper in that behalf, subject to the following restrictions:—

(i) The term is not to exceed—

Twenty-one years for an agricultural or occupation lease.

Ninety-nine years for a building lease.

- (ii) The lease is to take effect in possession not less than twelve months after its date.
- (iii) The best rent is to be reserved and no fine taken.
- (iv) The lease is to contain a covenant by the lessee for payment of rent, and a condition of re-entry if the rent remains unpaid for thirty days at the longest.
- (v) The lease is to be executed in duplicate, and a counterpart delivered by the lessee to the lessor.
- (vi) If it is the mortgagor who makes the lease, he is, within a month of making it, to deliver to the mortgagee, or if there be more than one mortgagee, to the first mortgagee in priority, a counterpart lease duly executed by the lessee. Such a lease, when granted by the mortgagor, is to be valid as against every incumbrancer (which includes the mortgagee), and, when granted by the mortgagee, is to be valid against all prior incumbrancers and the mortgagor.

But it is again to be noticed that the section only applies so far as a contrary intention is not expressed by the mortgagor and the mortgagee, either in the mortgage deed or otherwise in writing. This somewhat detracts from the usefulness of the section, and will make it necessary for an intending lessee to inquire (if he may be allowed to do so, which the 2nd section of the Vendor and Purchaser Act, 1874, seems to preclude) whether the provisions of the act have been excluded. Again, this section is not to prevent powers of leasing being given by the mortgage deed itself to the mortgagor or mortgagee or both, and of course such express powers exclude the operation of the implied powers given by the act.

The section applies to mortgages made after the commencement of the act, and also to mortgages made before, if it is agreed that it shall apply in a writing made, after the commencement of the act, between the mortgagor and the mortgagee.

Note, also, that the act authorizes the making a mere verbal letting or lease, and also an agreement for a lease, whether written or not; but of course it does not affect any enactment which requires a lease to be by deed or in writing. And it is obvious that if a mere verbal lease be made, some of the above provisions (*e.g.*, the provision as to the delivery of a counterpart) cannot apply; nor could there be, in the strict sense of the term, a "covenant" to pay

the rent. And, on the whole, we consider that it would not be safe to make a lease under this section, however short the term might be, without a deed.

Although this section provides for the best rent being reserved, yet there is an exception in the case of building leases, on which a mere nominal rent may be reserved for the first five years. The effect of this is very serious in the case of a lease by the mortgagor, since it practically deprives the mortgagee of all chance of getting his interest out of the income of the property for the five years.

(8) *The Attornment Clause.*

The object of this clause is to give the mortgagee an additional remedy for the payment of the interest on the mortgage debt. This object is achieved by the mortgagor (who, to render the clause of any use, must, of course, be in possession) expressly constituting himself in the deed a tenant of the mortgagee of the mortgaged premises at a yearly rent equivalent, as a rule, to the annual amount of interest. The result was that the mortgagee was enabled to treat the mortgagor just as any ordinary lessor would treat a lessee, and if the rent, or, in this case, the interest, was in arrear, to distrain upon the property on the premises, and so recover the arrears by a self-remedy. Sometimes, instead of an attornment clause, a power or licence to distrain was given to the mortgagee. Of these two schemes, both had their advantages and disadvantages. Thus, as to the attornment clause, it was not transferable by the mortgagee (*Brown v. Metropolitan Life Assurance Co.*), while the power of distress apparently was so, though this seems to be doubted by Coote in his work on Mortgages. (See p. 691.) Again, the attornment clause was said to make the mortgagee liable to account to other incumbrancers for the rent which might have been received by him, on the ground that he was in the same position as a mortgagee in possession. (See *Re Stockton Iron Furnace Co., Ex parte Punnett; Ex parte Harrison, Re Betts.*) But *Stanley v. Grundy* decided that this obligation was not cast on the mortgagee unless he had actually exercised his right to distrain. The great advantage, however, of the attornment clause was that it enabled the mortgagee to effect his distress on all the goods which happened to be on the premises,

whether they were the goods of the mortgagor himself or the goods of a stranger (*Kearsley v. Phillips*), while the power of distress was a mere licence, and only authorized the seizure of goods belonging to the mortgagor. (*Freeman v. Edwards*.) And again, the power of distress was avoided by the bankruptcy of the mortgagor, which vests his goods in his trustee, but under the attornment clause the mortgagee might distrain for arrears of rent under the same conditions as any ordinary landlord.

We have adopted the past tense in speaking of the attornment clause, for it would seem that the Bills of Sale Acts, 1878 and 1882, have practically the effect of abolishing them from mortgages. For, by the first act, a bill of sale includes "every attornment, instrument or agreement, not being a mining lease, whereby a power of distress is given, or agreed to be given, by way of security for any debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on a debt, or otherwise for the purpose of such security only." There is, indeed, a proviso at the end of the section, which provides that it shall not extend to any mortgage of land which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair rent. But, it will be observed, this proviso only operates when the mortgagee is in possession; and the attornment clause is generally only of use when the mortgagor is in possession. The result of an attornment clause, being a bill of sale to secure money, is that, *inter alia*, it must, under the Act of 1882, be attested and registered in a certain way, and must be in accordance with the statutory form set out in that act, otherwise it is void altogether; and it seems difficult, if not impossible, to frame the attornment clause in such a way as to make it comply with the statutory form, and even if this is possible, the mortgagor will hardly consent to have the mortgage deed publicly registered as a bill of sale.

About the power of distress, too, there is some doubt. Some think that if such a power is given, without at the same time reserving a rent, this would not fall within the 6th section of the Bills of Sale Act, 1878. But this seems to be very doubtful.

If, however, you decide to insert the attornment clause, you should take care not to frame it so as to prevent the mortgagee from entering without notice and determining the tenancy. (See

Brown v. Metropolitan Life Assurance Society.) Again, you must not fix the supposititious rent at an amount preposterously exceeding the annual value of the property; for if it is so grossly out of proportion to that value, it will be held to be a sham rent, and accordingly void as a fraud on the bankrupt law. (See *Ex parte Williams*, and *Re Stockton Iron Furnace Co.*) Note, too, that an attornment may be made to a second mortgagee (*Morton v. Woods*); and this even though there is subsisting a previous attornment to a first mortgagee. (*Ex parte Punnett.*) Further, the proceeds of the distress, when levied, may be applied not only in satisfaction of the interest in arrear, but also in payment of the principal. (*Ex parte Harrison.*)

CHAPTER III.

POWERS AND DUTIES OF MORTGAGORS AND MORTGAGEES
IN POSSESSION.

INDEPENDENTLY of the powers and duties conferred and imposed by the mortgage deed, there are certain powers which the mortgagor or the mortgagee may exercise while in possession; and, similarly, there are certain duties which the rules of equity compel them to observe. A mortgagor, while he is still in possession, is to a great extent treated in equity as still being the owner of the land; and may, accordingly, exercise many acts of ownership. We have seen that he cannot make a lease of the property which will be binding upon the mortgagor except by virtue of an express power, or under the provisions of the Conveyancing Act, 1881; but he may, as a rule, cut timber on the estate, unless the result would be materially to diminish the value of the security. (See *King v. Smith*.) He may, also, now (although he could not do so formerly) bring actions in his own name for the recovery of the rents and profits of the property, and may sue for trespasses done to the land, &c. under sect. 25 of the Judicature Act, 1873. He may also cut and remove growing crops, so long as he has received no notice from the mortgagee demanding possession; but such a demand will put an end to this right; and it is not necessary for the mortgagee to take proceedings in ejectment, as the mere demand for possession is sufficient to determine his possession, and to make any further continuance in it wrongful. (See *Bagnall v. Villeir*.)

The mortgagee has the right to take possession at any time after the time appointed for payment of the debt; and, having taken possession, is entitled to receive the rents and profits, and apply them towards the payment of his debt. But he will have to account for all the rents, &c. he receives. In the management of the property he is bound to act in the same way as a prudent

man would act if the property were his own. Thus he will be responsible for any acts of gross injury, or of wilful negligence, *e.g.*, pulling down buildings without sufficient reason. But he may pull down houses and buildings which are ruinous, and build others on their site (*Hardy v. Rees*); and, as a rule, he will be allowed all sums expended by him in necessary repairs. (*Sandon v. Hooper*.) But if these repairs are of a very substantial and permanent nature, and involve considerable expense, it seems he will have to show the necessity of executing them before he is entitled to recover what he has expended. (*Tipton Green Colliery Co. v. Tipton Moat Colliery Co.*) He may, but is not bound, however, otherwise to lay out any money on the estate, or to expend money in rebuilding. (See *Godfrey v. Watson*, and *Moore v. Painter*.)

And, further, he should be careful not to engage in any speculative experiments with the land (see *Hughes v. Williams*); and it has been held that he must not open mines, unless the security proves deficient. (*Millett v. Davey*.)

Sometimes the rents received by the mortgagee when in possession are more than sufficient to keep down the interest on the mortgage debt. The surplus in such cases is to be expended in reducing the principal money. A question sometimes arises in such cases whether the mortgagee, in furnishing his accounts of the rents received, is to account, as it is called, "with annual rests," or whether he will not be laid under the necessity of doing so. He is said to account with the annual rests when the surplus rents are applied in payment of the principal, and each year the principal so reduced is considered as the money due on the mortgage, so that interest becomes payable not on the original amount advanced, but on the amount of principal as actually remaining due after the reduction effected by the receipt of the surplus rents. Whether or not he will be directed to account with annual rests will depend on the circumstances under which he took possession. If he did so arbitrarily, when, for instance, there was no interest in arrear, and there was no other ground for taking possession, he will generally have to account with annual rests; for the very fact of his entering when there is no interest in arrear shows his intention to get payment of his money out of the rents and profits, and so receive his money, as it is said, "in dribblets;" whereas if he is driven to take possession because the interest is in arrear, he does so for his own

protection merely, and no such intention can be implied in that case from his act ; so that the interest will be still payable on the amount of the money lent, and not on the amount as it actually stands from time to time after reduction by the application of the surplus rents. (See *Nelson v. Booth*.) This rule would not seem to apply to the case of a mortgage of leaseholds, if at least there are other circumstances which justify the taking of possession, as where he enters to prevent a forfeiture for nonpayment of ground rent or non-insurance. (*Patch v. Wild*.)

CHAPTER IV.

THE FORM OF THE MORTGAGE IN SPECIAL CASES.

I. Mortgage of a Life Estate.

THERE will of course be variations in the form of the mortgage when the property offered as security is not a freehold estate in fee simple. A mere life estate in lands is obviously not a desirable security, but it is sometimes accepted in conjunction with a policy of assurance on the life of the mortgagor as a security for a loan. When a life interest is mortgaged it is not the practice to have it assigned absolutely subject to a proviso for redemption to the mortgagee, but a demise is usually made of the land to him "for the term of a hundred years if the mortgagor shall so long live." The object of this is, that the powers of leasing, consenting to sales, &c., annexed to the life estate, shall not be affected. But since the Settled Land Act, 1882, it would not seem to make much difference whether the mortgage is by demise or by assignment of the whole life interest; for by sect. 50 the powers given by that act remain exerciseable by the life tenant, notwithstanding any assignment, nor can he contract not to exercise them. At the same time, the above section will not operate so as to prejudice the interests of the mortgagee without his consent, except that the tenant for life while in actual possession can make leases of the land at the best rent that can be obtained without fine, and in other respects in conformity with the act.

II. Mortgages of Copyholds.

Mortgages of copyhold land are effected by a surrender containing a condition that it shall become void upon the payment of the debt and interest on a specified day. The mortgagee is not as a rule admitted, for this gives him no advantage unless he wishes to realize his security, and until this occurs admittance will be un-

necessary, and will further render him subject to the necessity of having to pay the fine due to the lord on admittance. The surrender is accompanied or preceded by a deed of covenant to surrender, in which are embodied the usual mortgage clauses, and into which the Conveyancing Act, 1881, according to the opinion of most conveyancers, imports covenants for title, power of sale, and all the other clauses which it supplies to the more ordinary instances of mortgages of freehold lands. If the mortgage precedes the surrender by even a short length of time, it is usual to add to it a declaration by the mortgagor that he will stand seised of the premises until the surrender on trust for the mortgagee, his heirs and assigns, subject to the same equity of redemption as they would have been subject to had the surrender been already made; for this will enable the mortgagee to obtain the legal estate under the Trustee Act, 1850, by an order, in case the surrender is not duly made by the mortgagor. This of course will not be necessary when the money is not advanced (as it should not be) until the surrender is effected. On the mortgagee being paid off, if he has not been admitted, all that is necessary to revest the land in the mortgagor is to enter an acknowledgment of satisfaction on the court rolls, and it is also advisable to endorse a receipt for the money on the deed accompanying the surrender.

III.—Mortgages of Leaseholds.

Whether a mortgage of leaseholds shall be effected by an assignment or an underlease depends on the nature of the rent and covenants contained in the lease.

As we have seen, the assignee of a lease becomes liable for the rent and covenants contained therein as far as they affect the land, whereas an underlessee does not become so liable (*ante*, p. 163). Thus, then, if the rent and covenants of the proposed leasehold security are burdensome, it would obviously be disadvantageous to the mortgagee to take his security by way of assignment; but at the same time there is also this drawback to taking an underlease, that the mortgagor may commit some breach of covenant in the lease involving forfeiture: so that where the rent and covenants are not specially onerous an assignment of the whole term affords

the better security of the two. As a rule, in practice the mortgage is made by underlease. When this form is adopted, the deed should contain a declaration of trust by the mortgagor of the residue of the term for the benefit of the mortgagee and persons claiming under him, and also a power of attorney authorizing the mortgagee to assign that reversion to himself or any one else subject to the equity of redemption, if that should be existing at the time it is proposed to exercise the power. Should the property consist of renewable leaseholds it may be advisable to insert an express covenant by the mortgagor to renew on the request of the mortgagee, and to assign the property comprehended by the renewed lease to the mortgagee subject to the subsisting equity of redemption. But such a covenant is not absolutely necessary; for though in its absence the mortgagee cannot compel the mortgagor to renew, he can effect a renewal in his own name, and hold the renewed lease as a security not only for the mortgage debt and interest, but for the costs of renewal and interest thereon. (See *Lacon v. Mertins*.) And if the mortgagor renews the mortgagee is entitled to the benefit of the renewed term for the purposes of his security. (*Rakestraw v. Brewer*.)

In connection with a mortgage by way of underlease the provisions of the Bankruptcy Act, 1883, must be borne in mind. Under this act, should the mortgagor become bankrupt and his trustee disclaim the lease, the effect on the underlease will be that the mortgagee will either have to lose his security, or perform the covenants and pay the rent contained in and reserved by the original lease; for the disclaimer does not prevent the original lessor from entering upon the land under the condition of re-entry contained in the original lease. (Sect. 53; and see *Ex parte Walton, Re Levy*.)

And, further, it is expressly provided by the act that if the underlessee, on leave to disclaim the lease being sought from the court, seeks the court's assistance, the same can only be given him on the terms that the original lease vests in him, and then he would become entirely responsible to the lessor on the original covenants. These provisions materially detract from the value of mortgages by way of underlease.

IV. Mortgages of Reversions.

Reversions and remainders, whether vested or contingent, are by no means desirable securities, as they are of such a nature that they afford the mortgagee no protection in the way of taking possession of the property (and indeed, if they are contingent they may never come into possession at all); and again, they furnish no present existing fund to which the mortgagee can resort for payment of the interest or principal in event of the mortgagor's default. And, further, the mortgagee gets no title deeds if the reversion or remainder is dependent on a particular estate of freehold, and is thus subject to the risk of being postponed to some legal incumbrance previously created by the mortgagor. (See Coote's *Mortgages*, 376, 893, 4th ed.) If the mortgage is of a reversionary interest in stock a distringas ought to be put upon the stock, and if it is of a fund in court a stop order should be applied for.

V. Mortgages of Life Policies.

Mortgages of policies of life assurance are generally taken in conjunction with mortgages of life estates in land; they are sometimes, however, taken alone; but in this case they are but inefficient securities, as during the mortgagor's life there is no fund for the mortgagee to rely on, and the mortgagor may omit to pay the premiums, or do some act to make the policy fall through. If such a policy is taken as a security, and it is one which has been effected some time before the date of the mortgage, you should take the precaution of inquiring at the office of the company if they have notice of any previous incumbrance. Whether the policy is a previously existing one, or one effected for the immediate purpose of mortgaging it, the mortgage will be effected by assignment, and, immediately on completion, notice must be given to the assurance company, for otherwise a subsequent incumbrancer who does give such notice will obtain priority if he is unaware of your mortgage. (See *Consolidated Insurance Co. v. Riley*; and 30 & 31 Vict. c. 144, s. 3.)

The assignment should contain covenants by the mortgagor not to do anything which may avoid the policy; to restore it if by any means it becomes voidable; and to effect a new insurance in the name of the mortgagee if it becomes void; and to pay the premiums,

and deliver the receipts therefor to the mortgagee; a power to the mortgagee to pay the premiums if he makes default, and a covenant that, on the mortgagee doing so, he, the mortgagor, will on demand repay them with interest and expenses. If the policy is mortgaged in connection with land there should be a charge of these expenses on the land until repayment. (See *Re Leslie*.) But the mortgagee, even in the absence of stipulation, is entitled to charge the property with any sums he may advance to keep up the policy, with interest thereon at 4 per cent. (See *Bellamy v. Brickenden*.)

VI. Statutory Mortgages.

Where the case is a simple one, and the amount of the loan is small, so that the saving of expense is an object, you may, with advantage, have recourse to the short forms of mortgage provided by the Conveyancing Act, 1881. By sect. 26 of this act, a statutory form of mortgage (*vide* Part I. of the Third Schedule to the act) is provided, and is applicable to freehold or leasehold land. The deed must be expressed to be made by way of statutory mortgage, and be in the form given in the schedule, with such variations and additions as shall be necessary. And in this statutory mortgage, if the mortgagor is expressed to convey as mortgagor, there are to be deemed implied—

- (1) A covenant by the mortgagor to the mortgagee to pay the mortgage money at the stated time, with interest thereon at the stated rate, and thereafter, so long as the mortgage money remains unpaid, to pay interest thereon at the stated rate, by equal half-yearly payments.
- (2) A proviso for re-conveyance if the mortgagor pays the principal and interest on the stated day.

Besides this, sects. 19 to 24 import into this statutory mortgage powers (a) of sale; (b) of insurance; (c) powers to appoint a receiver; and (d) to cut timber; and by sect. 7 absolute covenants for title are supplied, if the mortgagor is expressed to convey as beneficial owner.

Sect. 27 provides in a similar manner a statutory form of transfer of a mortgage, which is itself in the statutory form. Three forms are given applicable in the three several cases:—

- (a) Where the mortgagor does not join;

- (b) Where the mortgagor joins and covenants with the transferee for payment of principal and interest;
- (c) Where the mortgagor and mortgagee both convey, and fresh covenants for payment and title are entered into; this latter form being really a transfer combined with a fresh mortgage to the transferee.

The effect of a statutory transfer (in whichever form it is made), as stated in the section, is to vest in the transferee the right to demand, recover and give receipts for the mortgage money and interest, and the benefit of the covenants in the mortgage, and the right to exercise all the mortgagee's powers; and all the mortgagee's estate and interest, subject to redemption by the mortgagor, vests in the transferee, still subject, of course, to redemption. If the transfer is made in the second form, a new covenant for repayment of the mortgage money and interest by the mortgagor to the transferee is implied; and, if made in the third form, it is treated not only as a transfer, but as a new statutory mortgage; and all the preceding provisions relating to statutory mortgages apply to it, nor is such a transfer liable to any increased stamp duty for being in effect a new mortgage.

Sect. 29 further gives a form of statutory reconveyance which may be adopted (*vide* form in the 3rd schedule), when the original mortgage has been made in a statutory form.

Sect. 28 contains a provision as to the effect of the implied covenants in statutory mortgages or statutory transfers, where—

- (a) More than one person are expressed to convey as mortgagors, or to join as covenantors;
- (b) The covenant is made with more than one mortgagee or transferee.

In case (a) the covenant implied is to be deemed a covenant by the mortgagors or covenantors *jointly and severally*; in case (b) the covenant is to be deemed a covenant with the mortgagees or transferees jointly; so that in suing on it, all the mortgagees or transferees must be joined, and the benefit of the covenant survives on the death of one. But if the amount secured by the mortgage is expressed to be secured to the mortgagees in shares or distinct sums, then the implied covenant is to be several in respect of the share or distinct sum advanced by each mortgagee.

VII. Equitable Mortgages.

Sometimes a temporary loan is wanted under the pressure of most urgent need, and there is no time in which to prepare a regular formal mortgage. Under these circumstances an equitable mortgage by deposit of title deeds may be resorted to. Such a mortgage may be created by the deposit of the title deeds relating to the estate (see *Russel v. Russel*), or even of a part of such deeds if they constitute a material portion of them. (*Lacon v. Allen*.) And such a mortgage has been deemed to have been effected where only one old deed was deposited where it was described, though falsely so, as being the only deed. (*Dixon v. Muckleston*.) And again, it has been held that where a written order was given by A. to B. directing C., a prior equitable mortgagee, to deliver the title deeds to B. as soon as C.'s lien on them was satisfied, this created a valid equitable mortgage. (*Daw v. Terrel*.) And in cases of an intention to prepare an ordinary mortgage, where the deeds are delivered to the proposed lender or his solicitor for the purpose of preparing the mortgage, this delivery will operate as an equitable mortgage of the premises should the money be advanced before the execution of the formal mortgage. (*Edge v. Worthington*.)

The deposit may be accompanied by a memorandum thereof. Such a memorandum, if drawn so as not to form an agreement, does not require a stamp, and is, of course, mere evidence of the deposit. But should the memorandum be, as is usually the case when there is sufficient time, expanded into an agreement to execute a legal mortgage of the premises on some future occasion, then this agreement must be stamped with an *ad valorem* stamp.

Questions have arisen whether a mere deposit of the deeds without any memorandum will afterwards extend so as to secure future advances, and it has been held that when such a deposit is made parol evidence may be supplied to show that it was made to secure future advances as well as the existing debt; and, in such a case, it will be a good security for the future advances. (See *Edge v. Worthington*.) And even if there is a memorandum of deposit which is silent on the point as to whether future advances are to be included, parol evidence is admissible here, too, to show that there

was an intention to that effect, and on this being shown the security will extend to them.

Other questions have arisen as to equitable mortgages, and *inter alia* the question, what is the proper remedy of the equitable mortgagee? Is he to have recourse to sale alone to obtain his money, or may he have recourse to foreclosure? It has been decided that his proper remedy is foreclosure. (*James v. James*; *York Banking Co. v. Artley*; *Backhouse v. Bonomi*.) But, as we have seen, under the 25th section of the Conveyancing Act, 1881, he may now, in the foreclosure action, ask for a sale, even though there is no memorandum of deposit. (*Oldham v. Stringer*.)

The depositor may at any time call for a formal mortgage. (*Parker v. Housefield*.)

Since an equitable mortgagee's only remedies are to proceed in equity to obtain a foreclosure, or a sale in lieu of foreclosure, and to sue in a common law court for money lent (for he has no power himself to sell, nor to take possession, nor to appoint a receiver, &c., as a legal mortgagee generally has), it follows that an equitable mortgage is, in any case, an undesirable security, and should never be accepted unless the mortgagee is well acquainted with the borrower and can rely on his will and ability to repay.

CHAPTER V.

TRANSFERS OF MORTGAGES.

I. The desirability of the Mortgagor's Concurrence in the Transfer.

On a transfer of a mortgage the question may arise, whether the mortgagor is to join in the transfer. His concurrence is not of course absolutely necessary, for the mortgagee has full power to assign the mortgage debt and interest and the security for the same to the transferee. But it is advisable for the mortgagor to join in every case for the following reasons :—In the first place, his joining amounts to an admission of the state of account between the mortgagee and himself; and then it shuts out, as between him and the transferee, any undisclosed equities which may exist between the mortgagor and the mortgagee. And further, it is the best evidence that notice of the assignment has reached the debtor, and prevents any doubts arising as to the rights of the transferee to exercise the mortgagee's powers. (See *Bodd v. Petrie*.) And, lastly, as it is the practice for the mortgagor when he joins to give a fresh covenant to pay the debt, the transferee gets the advantage of a direct covenant for its payment. It will not, however, be possible in all cases to obtain the mortgagor's concurrence; and in some cases where he is willing to join, he may not be able, as is generally done when he joins, to create a new proviso for redemption, by reason of his having dealt with the old equity of redemption in some way. Thus, then, a transfer of mortgage takes three forms according to the three cases: (1) where the mortgagor is not a party; (2) where he is a party and has not incumbered the equity of redemption; (3) where he is a party, but has incumbered the equity of redemption.

II. Transfer to which the Mortgagor is not a Party.

Where the mortgagor does not join, the mortgagee will assign the mortgage debt, and the interest thenceforth to become due on the same, and the benefit of the securities therefor. Formerly, a

power of attorney was necessary to enable the transferee to sue on the debt in the name of the mortgagee, but since the Judicature Act this is no longer necessary; for by sect. 25 of that act, an absolute assignment of a debt or other legal chose in action under the hand of the assignee (not purporting to be by way of charge only), of which express notice in writing shall be given to the debtor, will transfer the legal right to such chose in action. To complete the transfer of the debt, then, all that is necessary in addition to the written assignment, is to give written notice thereof to the mortgagor. Notice that sect. 25 only applies to absolute assignments of a debt or chose in action; and it has been held that it does not enable the mortgagee of a legal chose in action to sue in his own name, so that while a transferee of the mortgage debt could sue in his own name, a sub-mortgagee of the debt could not. (See *National Provincial Bank v. Harle*, and *Burlinson v. Hall*, ante, p. 125.) The mortgagee next transfers the mortgaged property to the transferee, "subject to such right or equity of redemption as is subsisting in the premises by virtue of the mortgage deed, on payment to the transferee, his executors, administrators and assigns, of the money secured." If the mortgagee transfers expressly as mortgagee, there will be implied by the Conveyancing Act, 1881, s. 7, a covenant on his part that he has not incumbered, and this is all the transferee is entitled to.

III. Where the Mortgagor is a Party, and has not Incumbered the Equity of Redemption.

In this case, the mortgagee, as before, assigns the mortgage debt, but merely for the purpose of showing that the mortgage debt is intended to be kept alive for the benefit of the transferee. The powers of sale and other remedies of the mortgagee need not be expressly transferred, for if they are express ones, they will pass without mention to the transferee, as an assign of the mortgagee, and if they are the implied ones given to the mortgagee by the Conveyancing Act, 1881, they will be exerciseable by the transferee as a "mortgagee" under that act. It is, however, the practice to mention them by adding to the assignment of the debt such words as "with the benefit of the power of sale, and all other powers, &c. given by the mortgage for the recovering, &c. of the

mortgage debt." As to the transfer of the mortgaged property, the mortgagee conveys at the request of the mortgagor, and the mortgagor conveys and confirms, and the habendum is made so as to discharge the property from the old equity of redemption, and subject it to a new one on payment of the money to the transferee. The mortgagee will covenant that he has not incumbered, and the mortgagor will give new covenants for title, and for the payment of the debt, and also, where the Conveyancing Act is not relied on, new powers of sale, &c.

IV. Where the Mortgagor is a Party, and has incumbered the Equity of Redemption.

In this case the debt is assigned by the mortgagee to the transferee as before, and the benefit of the power of sale, &c. alluded to as in the last case, but in the conveyance of the property, as neither the mortgagee nor the mortgagor can do anything to alter the equities affecting the land as against subsequent incumbrancers, a new equity of redemption cannot be created, but the habendum is made as in the first case, "subject to such equity of redemption as the premises are subject to by virtue of" the mortgage deed. The mortgagee covenants that he has not incumbered, but the mortgagor gives no new covenants or power of sale, as these would not be of any use, seeing that he has incumbered the equity of redemption.

V. Transfer of Mortgages of Copyholds.

When the property is copyhold, the form of the transfer will vary according to the way in which the mortgage has been effected. If the mortgage has been made by a mere covenant to surrender, not followed by the usual conditional surrender, the mortgagee assigns his equitable interest in the premises to the transferee, and the benefit of the same, with power to sue in his name, and the habendum will be made to the transferee, his heirs and assigns, subject to the subsisting equity of redemption on payment of the money secured to the transferee. When there has been a con-

ditional surrender, satisfaction of the old surrender should be entered up on the court rolls, and a new conditional surrender made by the mortgagor to the use of the transferee; but when the mortgagor does not join, or has incumbered the equity of redemption, it will be necessary for the mortgagee to be admitted and then to surrender to the use of the transferee, subject to the equity of redemption then subsisting. Sometimes, to avoid the expense of admittance and the fines due thereon, the transferee will not insist on it, but will be satisfied by a covenant by the mortgagee that he will surrender if required. When the mortgagee has been admitted on the original mortgage, he will of course have to surrender to the use of the transferee, subject as in the last case to the existing equity of redemption.

VI. Parties to the Transfer after Death of the Mortgagee.

When the mortgagee is dead who is the person to make the transfer?

The answer to this question depends on the date of the death of the mortgagee. If he died before August 7th, 1874, the property mortgaged would descend to his heir or pass under his will to his devisee, who would be the person to execute a conveyance of the premises to the transferee. But by the Vendor and Purchaser Act, 1874, it was enacted that the legal personal representative of a mortgagee of a freehold estate or a copyhold estate, to which the mortgagee had been admitted *might*, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate. This enactment did not, however, as you will perceive, take away the power of re-conveying from the heir or devisee, but merely gave the power of doing so to certain other persons as well as him. And it was held, in the construction of this act, that it only applied to the case of a re-conveyance, and did not extend to the case of a transfer of the mortgage to some third person. (*Re Spradbury's Mortgage*.) Nor did it extend to enable the personal representatives to convey to a purchaser who bought under an exercise of the power of sale. (*Re White's Trusts*.) Now, however, if the mortgagee dies after 1881, the 30th section of the Conveyancing Act, 1881, applies, and by virtue of that section a

mortgaged estate, on the death of any person in whom it is vested solely, will on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives like a chattel real, and they will then be the persons to execute the transfer. This section applies to copyholds. (See *Re Hughes*.)

It has been suggested that the section may be evaded by the appointment of a special executor for the purpose of dealing with mortgaged estates. If such person is appointed, and is held by the court to be a "personal representative," he will be the person to transfer. But we would not advise you to accept a transfer from such a special executor, until there has been some authoritative statement of law on the subject.

As already shown, the Conveyancing Act provides short forms of statutory transfers of *statutory mortgages*. (*Ante*, p. 235.)

CHAPTER VI.

RECONVEYANCE OF MORTGAGES.

WHEN the money has been paid off, the equitable interest of the mortgagee ceases, but in cases where the legal estate has been conveyed to him, it will have to be reconveyed by a formal deed before it can revest in the mortgagor. This re-conveyance, then, is not necessary where the mortgage is only an equitable one, so that on the payment off of a second mortgage, for instance, the mortgagee, not having the legal estate of the premises in him, cannot be called on to re-convey it. The same will be the case when the mortgage has been made by a deposit of title deeds. In these cases a receipt for the mortgage money and interest is sufficient to clear the property from the charge of the debt. But even where the legal estate is in the mortgagee, there is one case in which no formal re-conveyance of it is necessary. This is where the mortgage has been made to a building society; for, by the Building Societies Act, 1874, it is provided that a receipt for the mortgage money indorsed on or annexed to the mortgage deed, shall vacate the security and revest the estate in the person for the time being entitled to the equity of redemption without the necessity of any re-conveyance. (Sect. 142; and see *Fourth City Benefit Building Society v. Williams*.) Further, although no re-conveyance has in fact been made, the presumption that one has been made will arise after the lapse of a certain amount of time, if the legal estate has meanwhile been dealt with by the mortgagor, as if it had been revested in him. Lastly, if the mortgage was for a long term of years, no re-assignment is strictly necessary on repayment of the mortgage money, since by 8 & 9 Vict. c. 112, directly a long term of years becomes satisfied (*i. e.*, directly the purpose for which it was created is fulfilled), the term ceases, and so in this case the receipt for the mortgage money would suffice, since such receipt shows that the term is satisfied and at an end.

A reconveyance generally recites the mortgage deed and the state of the debt, and then reconveys the estate to the mortgagor freed from all charges under the mortgage deed. As to who is the party to make the reconveyance when the mortgagee is dead, this depends on the same circumstances as the question, who is to execute a transfer of a mortgage when the mortgagee is dead? (See *ante*, p. 242.)

When the subject of the mortgage is copyhold land, and there has been merely a covenant to surrender, it is usual to release the debt by deed, though a mere receipt for the mortgage money and interest would, in equity at least, be quite sufficient. If there has been a conditional surrender the mortgagee gives a warrant to enter up satisfaction on the court rolls, and when this has been done the land will be discharged from the debt. If the mortgagee has been actually admitted he will have to surrender again to the use of the mortgagor.

As already stated, the Conveyancing Act, 1881, supplies a short form of statutory reconveyance, which can be used in reconveying mortgaged property when the mortgage itself was drawn as a statutory mortgage.

CHAPTER VII.

BILLS OF SALE.

IN superintending the preparation and completion of a bill of sale of personal chattels (whether it be an absolute one or one by way of mortgage), it will be absolutely necessary for you to have at your fingers' ends the provisions of the Bills of Sale Acts, 1878 and 1882, and to have an intimate acquaintance with the most important at least of the numerous cases which have been decided in the interpretation of the various sections of these two statutes. Prior to the 10th of June, 1854, the validity of a bill of sale was not dependent on any statutory enactment; but on that date the Bills of Sale Act, 1854, came into operation, and, as one of its main provisions, required the registration of all bills of sale made after that date. This statute was supplemented by the Act of 1866, which required re-registration of a bill of sale every five years. But both these statutes are now repealed, and the law on the subject is at the present time contained in the two Acts of 1878 and 1882. As the later statute is to be construed as far as possible as one with the former, it will be the most convenient plan to consider the provisions of the two statutes together, and this we propose to do under the following several heads:—

- I. What is a bill of sale within the acts?
- II. What are personal chattels within the acts?
- III. The requisites of the Act of 1878 as to the contents, execution, attestation and registration of the bill of sale.
- IV. The requisites of the Act of 1882 as to the contents, execution, attestation and registration of bills of sale.
- V. What amounts to "apparent possession" under the Act of 1878?
- VI. How far the order and disposition of the Bankruptcy Act is affected by registration.

I. What is a Bill of Sale within the Acts?

A bill of sale which will come within the provisions of the acts includes—

Bills of sale, assignments, transfers, declarations of trust without

transfer, inventories of goods with receipts attached thereto, or receipts for the purchase-money of goods and other assurances of personal chattels.

Powers of attorney, authorities or licences to take possession of personal chattels as security for any debt.

Any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred.

Every attornment, instrument or agreement whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future or contingent debt or advance, and whereby any rent is reserved or made payable as a mode for providing for the payment of interest or otherwise for the purpose of such security only. But this does not extend to a mortgage of real estate which a mortgagee, being in possession, has leased to the mortgagor at a fair and reasonable rent.

The Act of 1878 applies to all bills of sale executed after the 31st December, 1878, whether such bills are absolute or subject or not to any trust, whereby the holder has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised therein. The Act of 1882 only applies to bills registered on or after November 1st, 1882 (*Eli-Hickson v. Darlow*), and when they are given as security for the payment of money, and in that case only. Thus, sects. 8 and 20 of the Act of 1878 are still in force with regard to absolute bills of sale, which must be registered in accordance with sect. 8 of that act. (See *Swift v. Pannell*. This case was followed in *Ex parte Izard* and *Casson v. Churchley*.)

In the construction of this catalogue, it has been held that the form of the instrument is immaterial, so long as the intention to transfer or create a security, by passing the immediate property, be shown (*Branton v. Griffiths*); that it is not necessary that the bill of sale should be contained in one instrument (*Ex parte Odell*); that the instrument will not be a bill of sale within the act unless it be given by the person who is the owner of the property comprised in it; so that if furniture is sold on the hire system, and in the hiring instrument it is stipulated that the property shall not pass to the purchaser till he has paid all the instalments, such

instrument will not be a bill of sale, so as to require registration (*Craucour v. Salter*, and see *Ex parte Orme*); that "inventories of goods with receipts attached" will include an inventory and receipt on an absolute sale under a writ of execution by the sheriff (*Chapman v. Knight*). But where the receipt is not the medium of transfer or record of transaction but merely an acknowledgment of payment, it is not a bill of sale (*Marsden v. Meadows*); that a "licence" within the act means a licence to take possession of property as a security for a debt (*Ex parte Newitt, Re Garraud*); but not a licence to take possession of them in discharge of a debt.

The Bills of Sale Act, 1878, expressly provides that the following shall not be deemed bills of sale within the act:—Assignments for the benefit of the creditors of the assignor; marriage settlements; transfers or assignments of any ship; transfers of goods in the ordinary course of business; bills on sale of goods in foreign parts, or at sea; bills of lading; India warrants; warehouse keepers' certificates; warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented. The words "marriage settlement" however, only include ante-nuptial settlements, or settlements made after the marriage, but in pursuance of ante-nuptial agreement (see *Ashton v. Blackshaw*); and other post-nuptial settlements of personal chattels are bills of sale within the Act of 1878, and form a good example of *absolute* bills of sale. And by sect. 17 of the Act of 1882, the act is not to apply to debentures issued by any mortgage, loan, or other incorporated company, and secured on the capital stock or effects of the company (see hereon *Brocklehurst v. Railway Printing and Publishing Co.*, which shows that debentures, to come within sect. 17, must operate as a charge on the company's property.) Again, a document accompanying the pledge of goods as a security for money need not be registered to make it valid (*Re Hall, Ex parte Close*; *Re Cunningham & Co.*); nor need a building contract which provides that all materials brought on the land by the contractor shall become the property of the contractor's employer (*Rceres v. Barlow*).

II. What are Personal Chattels within the Acts ?

This question is answered by the 4th section of the Act of 1878. Such chattels will comprise—

Goods, furniture and other articles capable of complete transfer and delivery, and fixtures and growing crops, if these are separately assigned or charged. But they do not comprise chattel interests in real estate ; fixtures (except trade machinery), when assigned together with a freehold or leasehold interest in the land to which they are affixed ; growing crops assigned with an interest in the land on which they grow ; shares or interests in government stock, funds or securities, or in the capital or property of any incorporated or joint stock company ; choses in action ; stock or produce on any farm or lands which, by virtue of agreement or custom, ought not to be removed from any farm where they are when the bill of sale is made.

With regard to fixtures the act provides that they shall not be deemed to be separately assigned or charged, by reason only that they are assigned by separate words, or that power is given to sever them from the land, so long as some interest in the land is by the same instrument conveyed to the assignee. But fixtures in this sense will not include trade machinery within the act ; and an assignment of such machinery will have to be registered, even though assigned in connection with some interest in the land to which it is attached. Trade machinery within the act means the machinery used in or attached to any factory or workshop, with the following exceptions :—fixed motive powers, such as water wheels and steam engines, steam boilers, donkey engines, and other fixed appurtenances to the said motive powers—the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose—pipes for steam, gas, and water in the factory or workshop. A factory or workshop is any premises on which any manual labour is exercised by way of trade, or for the purposes of gain, in or incidental to the making of any article, or part of an article, to the lettering or repairing, ornamenting or finishing any article, or to the adapting for sale of any article.

It will be convenient here to consider how far a bill of sale can be framed so as to affect after-acquired chattels. To state the

matter briefly, it will be useless in future to make a mortgage of after-acquired chattels by bill of sale; for by the Act of 1882, the bill has to have annexed to it a schedule containing an inventory of the property comprised in the bill, and it will be void (except as against the grantor) as to chattels not so described; and again, such a bill will be void (except as against the grantor) in respect of chattels of which he (the grantor) was not the true owner at the time of execution. In spite of registration, then, the after-acquired chattels would, if they were in the possession of the grantor at the time of an execution or on his bankruptcy, pass to the execution creditor or the trustee, and the mortgagee would derive no protection from his security.

At common law a man could not grant property not yet acquired by him, but which he merely expected to acquire. But in equity it was held that a man might assign property, which he had no interest in at the date of the assignment, but which he expected would be his at some future date, provided such property was capable of being identified and was specific. For example, it was held in *Lazarus v. Andrade*, that future property was sufficiently specific if it was described as "stock-in-trade, goods, chattels, and effects, which shall or may be brought into the said messuage at any time during the continuance of this security, or be appropriated to the use thereof, either in addition to or in substitution for stock-in-trade, &c. now being therein." But where the property was to be brought on to certain premises, or "elsewhere in the kingdom of Great Britain," it was held it was not sufficiently specific. (*Belding v. Read.*)

In order effectually to transfer the future property there must be an actual assignment of it which operates to pass a present interest in it. If the assurance amount to a mere licence to take possession of it or to seize it, it will be necessary for the assignee to take possession of the property when the assignor acquires it before it will vest in him. (See *Congreve v. Eretts*; *Hope v. Hayley.*) And again, it must be more than a mere contract to assign. If it is merely a contract of this kind the result will be that if the intended assignor becomes bankrupt before acquiring the property, and gets his discharge in bankruptcy, having yet not acquired such property, the discharge will free him from the contract, so that when he does acquire the designated goods or chattels they will not pass to the assignee. (See *Collyer v. Isaacs.*) It should be borne in mind, too,

that notwithstanding the Judicature Act, 1873, an assignment of property to be acquired by the assignor at some future date remains an equitable assignment, so that if the assignor upon acquiring the specified property transfers it for value to some third person who has no notice of the prior equitable assignment, the first assignee's rights will be defeated, and the third person will have priority, as he has got the legal title. (*Joseph v. Lyon* ; *Hallas v. Robinson*.) Finally, you should note that there are certain cases in which future property can still be assigned or mortgaged in spite of sect. 4 of the Bills of Sale Act, 1882, and the assignment yet be good as against other persons than the grantor. These are the cases of the assignment of growing crops separately assigned or charged, where such crops are actually growing at the date of the execution of the bill, and of fixtures separately assigned or charged, plant or trade machinery which have been substituted for fixtures, plant or trade machinery enumerated in the schedule to a bill of sale. (See sect. 6.)

III. The Requisites of the Act of 1878 as to the Contents, Execution, Attestation, and Registration of Bills of Sale.

Having now seen what is meant by the expressions "bill of sale," and "chattels" within the two acts, we must proceed to examine what are the requirements of the Act of 1878 as to bills to which it applies, and to which the Act of 1882 does not apply. As we have before pointed out, the Act of 1878 applies to all bills, *whether absolute or not*, executed on or after the 1st January, 1879, and registered before the 1st of November, 1882, and also to all bills of sale registered after the latter date, unless they are bills given by way of security for the payment of money. With regard to the bills to which it applies, the Act of 1878 requires them to be duly attested and to be registered under the act within seven days of the making or giving thereof, and to set forth the consideration for which it is given. The result of not complying with these requirements (which as to absolute bills must still be observed in spite of the Act of 1882, and the repeals effected by that act (*Casson v. Churchley*), is that the bill will be void as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in the bill under the bankruptcy laws or under any assignment for the benefit of the creditors of such person, and also as against all execution creditors. But the bill is only void as against these persons so far

as regards the property in or right to the possession of any chattels comprised in such bill which at or after the filing of the bankruptcy petition, or the execution of the assignment, or the execution of process, and after the expiration of such seven days, are in the possession or apparent possession of the grantor.

The Consideration.

You will have to be most careful in setting forth the consideration for which the bill is given, and you must bear in mind that any setting out of it which does not comply with the statute will not be remedied by the satisfactory setting out of it in the receipt, which is generally appended at the foot of the bill or elsewhere; for it has been held that such a receipt forms no part of the bill, and so cannot be looked to to cure any defect in the setting out of the consideration in the body of the bill. (See *Ex parte Charing Cross Bank, Re Parker.*)

In order not to offend against the statutory provisions you should set out the manner of payment of the consideration, and all the circumstances attending such payment, in the fullest possible way, taking especial care to show what sum of money is actually paid to and received by the grantor for the making of the bill. For this really constitutes the consideration for which the bill is given. If, for instance, it appears from the statement of the consideration in the bill that the grantor received 120*l.*, but the actual fact is that he only received 90*l.*, 30*l.* being retained by the grantee for interest and expenses, the bill does not in this case truly set forth the consideration for which it was given, and so will be void as against the grantor's trustee in bankruptcy. (See *Ex parte Charing Cross Bank.*) Again, if from the bill the consideration apparently received by the grantor is 700*l.*, but he only receives 692*l.* 10*s.*, 7*l.* 10*s.* being retained by the grantee for commission on the loan and for expenses in pursuance of a prior engagement, the consideration in this case will be deemed not to be truly stated, and the bill will be void as against an execution creditor. (*Hamilton v. Chaine.*) But it would seem from the case of *Hamlyn v. Beltley*, that the bill will satisfy the requirements of the act although part of the consideration as expressed to have been paid therein is retained to pay debts which are *actually due* at the time of the execution from the grantor, the retention being made at his request. But this cannot be validly done if the debts for which the retention

is made have not become due at the date of the execution of the Bill. (*Ex parte Rolph, Re Spindler.*) This last-mentioned case shows also that if in the bill the consideration is expressed to be paid at a certain time, and this is not actually done, but a part of the money is retained by the request of the grantor, partly to pay expenses and partly to pay rent to which the grantor is liable, but which has not yet become due, the consideration will be deemed not to have been truly stated, for even if the sums retained be taken to have been paid to the grantor they were not paid at or before the execution of the deed when they were expressed to have been so paid in the bill. In this case the Court said that the consideration was so much money then paid by the lender to the borrower, and an agreement by him to pay a further sum at a future day to someone else, and that ought to have been stated in the bill of sale. Again, in *Ex parte Firth, Re Cowburn*, it was held that where the amount of expenses incident to the preparation of the bill is deducted from the sum expressed in it to be the consideration, and only the balance is really paid to the grantor, the consideration is not truly stated. This case controls two previous cases (*Ex parte National Mercantile Bank* and *Ex parte Challinor*). And the joint result is that if part of the consideration stated in a bill of sale is by the grantor's directions, given at the time of the execution of the deed, applied in satisfying one of his then existing debts, the money so paid may properly be stated in the deed to be *then* paid to him. But the expenses of the preparation of the bill are not debts existing at the time of the execution of the deed, for they do not become due till the matter is completed. A recent case (*Ex parte Bolland, Re Roper*) shows that no money need actually pass at all. Here the consideration was expressed to be 2,000*l.* paid by the grantee to the grantor immediately before the execution of the deed, but no money was in fact paid, the 2,000*l.* being the unpaid balance of the purchase-money of certain leasehold property. The grantor became bankrupt, and his trustee sought to have the deed set aside as being void against him on the ground that the consideration was not truly stated. But the Court held that the consideration was properly stated, and that it was not necessary that the form should be gone through of first paying off the debt, then readvancing the money. (See also *Credit Co. v. Pott, Ex parte National Mercantile Bank; Ex parte Johnson, Re Chapman.*)

If the consideration stated to be paid upon execution is not actually then paid, but consists of sums of money previously paid on various dates, as where it is stated to be 65*l.*, now paid by the grantee to the grantor, but as a matter of fact that sum has been advanced by instalments at different times, all previous to the execution of the bill, the consideration will not in this case be considered to have been truly stated. (*Ex parte Berwick, Re Young*. See and distinguish *Ex parte Allam*.) Finally, an obvious mistake in the statement of the consideration will not invalidate the bill. (See *Ex parte Winter*.) And the money secured by mortgage by way of bill of sale cannot be made repayable on demand (*Hetherington v. Groome*), nor a certain time after demand, this being an infringement of the spirit of the Bills of Sale Act, 1882. (See *Bishop v. Beale* and *Clemson v. Townsend*.)

Attestation.

We must now turn to the mode prescribed by the Act of 1878, for the attestation of bills of sale which the statute applies to. Sect. 10 requires the execution to be attested by a solicitor, and that the attestation shall state that before the execution of the bill the effect thereof was explained to the grantor by the attesting solicitor. It has been held that this attestation is only essential in those cases in which the bill has to be followed by registration, to make it valid under the act. Registration is not required to make the bill valid as between the grantor and the grantee, so that it follows that a bill of sale will not be void as against the grantor, even though it has not been attested by a solicitor; but it will be void in such a case against an execution creditor or trustee in bankruptcy of the grantee. (See *Davis v. Goodman*.)

Curiously enough, it has been held that though the attestation must contain a statement that the attesting solicitor explained the effect of the bill to the grantor before execution, it is not necessary to the validity of the bill that any such explanation shall in fact have been given to the grantor. (See *Ex parte National Bank, Re Haynes*.) And further, it is not necessary that such a statement shall be contained in the affidavit, which, as we shall see hereafter, has to be filed upon the registration of the bill. (See *Ex parte Bolland, Re Roper*.)

The attesting witness must be a solicitor; but it is not necessary that he be one practising for himself or having a certificate. Thus,

a managing clerk who has been admitted, but who has not taken out a certificate, can attest a bill. (*Hill v. Kirkwood.*) The grantee of the bill, even if he is a solicitor, is disqualified from acting as the attesting witness. (*Seal v. Claridge.*) But it has been decided that a solicitor who acts for both parties to the bill (*Vernon v. Cook*), or even for the grantee only (*Penwarden v. Roberts*), may attest the bill.

Notwithstanding the fact that sect. 8 of the Bills of Sale Act, 1878, which requires this attestation by a solicitor, has been repealed by the Act of 1882, yet the repeal only applies to bills of sale given as a security for money, and consequently absolute bills of sale must still be attested by a solicitor, to make them binding as against third parties. (*Swift v. Pannell; Casson v. Church.*) Thus, if a man settles his furniture on his wife by a post-nuptial settlement, not made in pursuance of ante-nuptial articles, the settlement being a bill of sale of personal chattels within the Act of 1878, and not being given as a security for money, must be executed and attested as the Act of 1878 requires.

Registration.

Upon applying to register the bill, not only must a true copy thereof, and of every schedule or inventory annexed to it, and of every attestation of its execution, be filed, but also an affidavit proving the following facts: the date of the execution; the due execution and attestation of the bill; and containing a description of the residence and occupation of the grantor and of the attesting witness. This affidavit may be sworn before a master of the High Court or a commissioner; and wilfully to make a false affidavit for the purposes of the act will subject the offender to the consequences of perjury.

First, we propose to notice some of the numerous decisions which have been arrived at by the courts as to what the act requires the affidavit to state with regard to the residence and occupation of the grantor and attesting witness. While it is not necessary that the grantor should be precisely and minutely described, so that an error in his christian name will be immaterial so long as he can be identified from the description (see *Ex parte McHattie, Re Wood*), it is necessary that his residence and occupation should be accurately described. A misdescription, however, to be fatal, must be one which is calculated to mislead creditors. Thus, if it is but a slight

one, and one which is, on the face of it, evidently a mistake and would deceive nobody, it will not invalidate the bill. For instance, where New Street, Blackfriars, was stated to be in the county of Middlesex, instead of in the city of London, it was held that this misdescription of the grantor's residence did not invalidate the bill. (*Hewer v. Cox.*) But where the number of the house in a street was incorrectly stated, it was held that this was fatal. (*Murray v. Mackenzie*; see also *Blount v. Harris.*) It has been held that the residence meant by the act is the place where the person carries on his business and where he can be found during the day, and not the place where he merely sleeps. (See *Attenboro v. Thompson.*) If the grantor has more than one place of residence, it is not necessary to mention them all, but his principal place of occupation or business should be selected. (See *Ex parte National Mercantile Bank, Re Haynes.*) The place of residence to be given is the residence at the date of the making of the affidavit, and this address is to be given if it should happen that the grantor has changed his place of residence between the execution of the affidavit and the making of the affidavit. (*Button v. O'Neil.*)

An accurate description of the grantor's occupation must be given. Thus, it has been held that "gentleman" is not a sufficient description of a solicitor or a solicitor's clerk (*Taunton v. Sanomer*; *Beales v. Tennant*), or, as a rule, of any person who has a recognized profession, business or avocation. (See *Ex parte Hooman, Re O'Connor*; *Allen v. Thompson.*) At the same time it is not necessary to mention, when he is out of business, any occupation which he has only temporarily or casually followed. (*Smith v. Cheese*; *Morewood v. South Yorkshire Co.*) And where the grantor was described as "until lately a commercial traveller," without any further description, it was held insufficient. (*Castle v. Downton.*)

If there is a discrepancy between the descriptions in the bill and in the affidavit, the bill will be invalidated as a rule. It has, however, been held that if the description of the grantor's residence or occupation be insufficient in the affidavit, yet if the description on the bill be alluded to therein, the defect will be cured. (*Jones v. Harris.*) But as to the result when no such allusion is made, see *Murray v. Mackenzie*, which would seem to show that the bill would in such a case be invalidated.

This affidavit must also state that the bill was duly attested by the attesting solicitor, which has been interpreted to mean that it

must state that he was present and witnessed the due execution. If the affidavit omits to make this statement the registration will be invalidated. (*Ford v. Kettle.*) So, too, if the affidavit merely verifies the signature of the solicitor to the attestation, and describes his residence and occupation, it will be insufficient. (*Sharp v. Birch.*)

As to the manner in which registration is to be effected, the bill with any schedule or inventory annexed to it or referred to in it must be presented to the registrar within seven days of execution, and a true copy of the bill, and of the schedule or inventory, and of every attestation to its execution, and of the affidavit, must be filed with the registrar at the same time. And if the bill is given subject to any defeasance or condition, or to any declaration of trust not contained in it, such defeasance, &c. is deemed part of the bill, and must be written on the same paper as the bill before registration, and must be truly set forth in the copy filed. The functions of the registrar are ministerial, not judicial, so that he must receive and file the papers, though they are insufficient. (See *Needham v. Johnson.*) The validity or otherwise of the papers is to be decided by the court, and not by the registrar. It is his duty to keep a register and enter therein the name, residence and occupation of the grantor of every bill filed, and certain other particulars, and he must also keep an index of the names of the grantors. If the registration within the prescribed time be accidentally omitted, or if the name, residence or occupation be omitted or misstated, any judge of the High Court, if satisfied that the omission or the misstatement was due to accident or inadvertence, can order it to be rectified.

As we said, the registration is to be effected within seven days. If this time expires on a Sunday or other day on which the registrar's office is closed, the bill may be registered on the next following day on which the office is open; and the time for registration may be extended by the court when the omission to register has been purely accidental. Before the seven days have expired the bill is good, though not registered. So that if within these seven days the grantee takes possession of the goods he will get a good title to them, and this though the grantor has meanwhile become bankrupt, or the goods have been seized by an execution creditor. (See *Marples v. Hartley.*) But after the seven days have expired,

if the bill be not then registered, it will be void as against an execution creditor, notwithstanding the fact that the creditor has had, before his debt was contracted, notice that the bill of sale had been given. (*Edwards v. Edwards*.) Formerly, in order to avoid the necessity of registration, the device of giving duplicate bills of sale was resorted to. Immediately before the expiration of the period allowed for the registration of the first bill, a second bill was given for the same debt and comprising the same property. Then again, just before the time for registering this second bill expired, a third bill was given in its place, and so on, the bills being renewed from time to time, but always within the twenty-one days, the time allowed for registration under the Act of 1854. But this device will now be of no use; for by the Act of 1878 it is provided that if a second bill be executed within seven days from the execution of an unregistered bill, and includes the same chattels or some of them, then if the second bill be given as a security for the same debt or part of it, it shall be absolutely null and void.

The Act of 1878 provides that the transfer of a bill of sale need not be registered.

Re-registration.

Besides registration in the first instance, the bill must be re-registered every five years, or the registration will become void. The re-registration is effected by filing an affidavit mentioning the date of the bill, and of the last registration thereof, and the names, residences and occupations of the parties to it, and stating that it is still a subsisting security. This affidavit must, if the grantor's residence has not been changed, give the same description of the grantor's address as that contained in the bill itself; or if that is erroneous, it should allude to it as being so, and give the correct address. (*Webster v. Morris*.)

By the Act of 1882, the provisions of which on this point supersede those contained in the Act of 1878, any person may at all reasonable times search the register on the payment of a prescribed fee, and subject to the prescribed regulations, and may inspect, examine and make extracts from any registered bill without being required to make any written application or to specify any particulars in reference thereto; but these extracts are to be limited to the dates of execution, registration, renewal of registration, the names,

addresses and occupations of the parties, the amount of the consideration, and other prescribed particulars.

Provision is made for the entry of satisfaction on its being proved that the debt for which the bill was given has been discharged, and the registrar may order a memorandum of satisfaction to be written on any registered copy of the bill. Further provision is made by the Act of 1882 for the local registration of bills in the district county courts when the grantor resides outside the London bankruptcy district.

The Result of Omission to Register and Re-register.

We will conclude this head of our remarks by briefly recapitulating the consequences of non-registration and non-re-registration. These are that the bill, though binding on the grantor, will afford the grantee no security in the event of the grantor's bankruptcy, or of any process being issued against him, but it will be absolutely void as against his trustee in bankruptcy, and as against a sheriff's officer or other person seizing any chattels comprised in it, and as against all persons on whose behalf writs of execution against the property of the grantor have been issued. But it will only be void as regards goods or chattels included therein, which are in the possession or apparent possession of the grantor, at or after the filing of the bankruptcy petition or the seizure under the writ of execution. As to what amounts to "apparent possession," we shall inquire later on (see *post*, p. 262). Besides being good as between the parties, if the grantor has died insolvent and his estate is being administered, the bill, though unregistered, will be good as against the unsecured creditors, and in spite of the Judicature Acts, the rules in bankruptcy will not apply in this case. (*Re Knott*.) And if a company give an unregistered bill, it will nevertheless be good as against the liquidator on the winding-up of the company. (See *Re Marine Mansions Co.*)

When there are two bills of sale comprising the same property, or a portion of them, the priority of the one over the other will be determined by the priority of registration, that having priority which was first registered. (See *Conelly v. Steer*). And where chattels were assigned by bill of sale to A., who did not register the bill, and afterwards a bill comprising the same chattels was given by the same grantor to B., who did register his bill, it was held

that even though A. had taken possession under his unregistered bill, B. was entitled to the goods, on the ground that A.'s bill was not registered, and that the fact that A. had taken possession made no difference. (*Lyons v. Tucker.*)

IV. The Requisites of the Act of 1882, as to the Contents, Execution, Attestation, and Registration of Bills of Sale.

We must now turn to the Act of 1882, and see what its requirements are as to the bill of sale to which it applies, *i. e.*, to bills of sale given as a security for money and registered on or after 1st November, 1882. The first of these is contained in s. 4, which requires every bill to have a schedule containing an inventory of the chattels comprised in the bill, and the bill will only have effect in respect of the chattels specifically mentioned in such schedule, and will be void except as against the grantor in respect of chattels not so specified. And further, even if the chattels be specifically described in the schedule, the bill will, except as against the grantor, be void as to those of which the grantor is not the true owner at the time of the execution of the bill. (Sect. 5.) The object of this provision is of course to prevent the mortgaging by bill of sale of after-acquired property. This schedule need not contain a detailed description of each article, but it must contain such an inventory as is usual in business, and a mere general description, such as "household goods," is insufficient. (*Roberts v. Roberts.*)

The act next restricts the power of the parties to stipulate at their pleasure upon what events the usual power to seize the goods comprised in the bill shall be exerciseable. In future, the parties can only contract that the grantee shall have power to seize the goods for the following causes:—

- (1) If the grantor makes default in payment of the money secured at the time provided for payment, or in the performance of any covenant or agreement contained in the bill and necessary for maintaining the security (see *Heatherington v. Groome*, *Bishop v. Beale*, and *Clemson v. Townsend*, which decide that the money cannot be made repayable on demand nor a certain time after demand);
- (2) If the grantor becomes bankrupt, or suffers the goods to be distrained for rent, rates or taxes;

- (3) If the grantor fraudulently either removes or suffers the goods, or any of them, to be removed from the premises ;
- (4) If the grantor does not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates and taxes (but see *Hammond v. Hocking*, *post*, p. 262) ;
- (5) If execution is levied against the grantor.

Moreover, when the grantee *has* seized, the grantor may, within five days from the seizure, apply to the court, or to a judge in chambers, and such court or judge, if satisfied that by payment of money or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the chattels, or make such other order as may seem just. It has been held that this section is retrospective, and applies to bills of sale as a security for money registered before the 1st November, 1882. (*Ex parte Cotton*.)

This section is supplemented by sect. 13, which provides that all chattels seized or of which possession is taken after the commencement of the act, under or by virtue of any bill, shall remain on the premises where seized or taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were seized or taken.

This section also applies, by express enactment, to bills of sale to secure money registered as well before as on or after 1st November, 1882.

The next requirements of the act are that the bill shall (1) be duly attested ; (2) shall be registered within seven days of execution, or if executed out of England, then within seven days after the time in which in the ordinary course of post it would arrive in England if posted immediately after execution ; and (3) shall truly set forth the consideration. If these requirements are not complied with the bill will be *absolutely* void and not good even as against the grantor, as a bill would be under similar circumstances if it fell within the Act of 1878 only. (See *Davies v. Goodman*.)

Sect. 10 explains what is meant by due execution, and provides that the execution of the bill by the grantor shall be attested by one or more credible witness or witnesses not being a party to the bill. You will observe that attestation by a solicitor, and the explanation by him of the effect thereof to the grantor, is no longer necessary, except as to those bills which do not fall within this act,

but fall within the Act of 1878. Registration and re-registration are effected in the same way as under the Act of 1878.

Sect. 12 makes the sweeping provision that every bill made or given in consideration of any sum under 30*l.* shall be void. A curious case (*Davies v. Usher*) was decided under this section. There A. applied for a loan of 15*l.*, and the following device was adopted in order to avoid the section and procure the giving of a bill of sale for 15*l.*, which would be valid in spite of it. The consideration was stated to be 30*l.*, of which 15*l.* was to be repayable on demand. Immediately after the execution of the bill the grantee demanded repayment of 15*l.*, which was repaid. It was held that, in the absence of evidence to show the transaction was a sham, the bill was valid. But such a bill of sale would now be held void altogether, as it has been since decided that the money must not be repayable on demand. (See *Heatherington v. Groome*.) Another great change is effected by sect. 9, which provides that a bill of sale given to secure money shall be void, unless made in accordance with the form in the schedule to the act. Two or three cases have been decided under this section. Thus, it has been held that the bill need not in express terms state the rate of interest to be paid, though the form in the schedule evidently contemplated that this should be done. (*Wilson v. Kirkwood*. See also *Melville v. Stringer*.) But a bill providing for the capitalizing of interest was held void as not following the form. (See *Davis v. Burton*.) But where there was a covenant by the grantor to insure, and power to the grantee to seize if receipts for the premiums were not duly produced, the bill was held good. (*Duff v. Valentine* and *Hammond v. Hocking*.) Where there is a covenant to pay the money secured on demand, this does not sufficiently comply with the form. (*Melville v. Stringer*; *Heatherington v. Groome*.) Nor is there such compliance when the money is repayable at a certain time after demand. (See *Bishop and Son v. Beale*; *Clemson v. Townsend*.)

Apparent Possession under Act, &c.

If a bill to which the Act of 1882 applies does not truly set forth the consideration, and is not duly attested and registered, it will be absolutely void; but as to bills to which this act does not apply, but to which the Act of 1878 does, the omission to comply with the above requirements only makes them void as against certain

specified persons, and only as to goods, &c. in the possession or apparent possession of the grantor. The 8th section of the Act of 1878, which makes this provision, is now repealed by the Act of 1882, so that the doctrine of apparent possession will only apply to bills to secure money registered before the 1st of November, 1882 (see sect. 15), and to absolute bills of sale, whether made before or after that date. (See *Swift v. Pannell*.) A few words on the doctrine will, however, be perhaps not without use.

When, then, do goods, &c., though assigned to some other person by bill of sale, still remain in the possession of their owner? It has been held that if the goods are delivered, for instance, to a banker for safe custody, or to a warehouseman, they will still be constructively in the possession of their owner. (See *Ancona v. Rogers*.) But goods seized in execution by a sheriff's officer, will not be in the apparent possession of the grantor of a bill of sale over them, even though the grantee himself has taken no possession. (*Ex parte Saffery*.) Such, too, will be the case where the goods are in the custody of the receiver appointed in an action, provided he has given the security, if any, required. (See *Taylor v. Eckersley*.) As to what is meant by apparent possession, the act provides that "personal chattels shall be in the apparent possession of the grantor of the bill so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him, or are used or enjoyed by him in any place whatever, notwithstanding that formal possession thereof may have been taken by or given to any other person." In illustration of this section may be cited the case of *Ex parte Hooman*. Here A. assigned furniture to B., and B. sent someone to the house to look after it, but A. continued to live in the house and to use the furniture. It was held that it still remained in the apparent possession of A. But for the chattels to be on premises occupied by the grantor, he must be the actual occupier of them, and not a mere tenant. Thus, if the grantor keeps the key of the premises, this will amount to *prima facie* evidence of his possession. (See *Ancona v. Rogers* and *Pickard v. Marriage*.) Where the grantor of the bill remained in the house, but subsequently let it, and the tenant actually entered, it was held that the furniture in the house ceased to be in the apparent possession of the grantor. (*Ex parte Morrison*.) But if the grantee merely puts a man in possession,

that possession will be deemed formal if the grantor keeps the key of the house and goes in and out at his pleasure. (*Seal v. Claridge*.) The contrary, however, will be the case when the grantee has obtained exclusive possession of both the goods and the premises on which they are. (*Smith v. Wall*.) The general rule is that the goods will be deemed to be in the grantor's possession unless something has taken place which amounts to notice to the public generally that the grantor's possession has ceased. Thus, if the grantor discontinues to reside on the premises, this will be enough to show that the goods thereon are no longer in his possession, even though his business continue to be carried on and his name remain over the door. (*Davies v. Jones*.) And if the grantee takes possession of the goods and advertises them for sale as being the goods of the grantor, and that they are to be sold under a bill of sale, this will amount to an act showing that the grantor's possession has ceased, even though the goods still remain in the grantor's house. (*Emanuel v. Bridger*.) But a mere unsuccessful attempt by the grantee to get possession of the goods will not be enough. (See *Ancona v. Rogers*.)

As to the effect of registration with regard to the "order and disposition" clause of the Bankruptcy Act, it is sufficient here merely to observe that the 20th section of the Bills of Sale Act, 1878, which provided that the doctrine of reputed ownership should not apply to bills executed on or after the 1st January, 1879, provided they were duly registered under the act, is repealed by the Act of 1882 (sect. 15), so that after the 1st November, 1882, the doctrine will again be applicable to goods comprised in bills of sale, given to secure money on or after 1st November, 1882, though they may be duly registered; but as the order and disposition clause now only applies to goods used by the grantor in the ordinary course of his trade or business, and not to the goods of a trader generally (Bankruptcy Act, 1883, s. 44), it follows that the grantee of a bill in due form, and properly attested and registered, is protected, even though he allows the goods to remain in the grantor's possession until bankruptcy, unless the goods are goods used by the grantor in his trade or business. Further, the holder of an absolute bill of sale, whether registered before or after 1st November, 1882, if attested and registered as required by the Act of 1878, is also fully protected as against the trustee in bankruptcy,

even though the goods are trade goods ; and this is also so as to bills of sale to secure money registered before 1st November, 1882 ; for the repeal of sect. 20 of the Act of 1878 does not apply to these bills, the goods comprised in which are taken out of the grantor's order and disposition by the provisions of the said 20th section of the 1878 Act. (See *Eli Hickson v. Darlow* and *Swift v. Pannell*.)

The above consideration of the two Bills of Sale Acts will show you that your freedom in drafting a bill of sale is very much restricted, and especially will this be the case when the bill is required by your client as a security for money advanced, and absolute bills of sale of chattels are extremely rare. In drawing a bill of sale by way of mortgage, you should have before you the form given in the schedule to the Act of 1882, and follow it as far as possible. We will conclude our observations on bills of sale by setting out in full the statutory form.

FORM OF BILL OF SALE.

THIS INDENTURE made the day of , between A. B. of of the one part, and C. D. of of the other part, Witnesseth that in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges [*or whatever else the consideration may be*], he the said A. B. doth hereby assign unto C. D., his executors, administrators and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ , on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A. B. doth also agree with the said C. D. that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C. D. for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said A. B. in the presence of me E. F.
[*add witness's name, address, and description*].

PART III.—LESSORS AND LESSEES.



CHAPTER I.

THE PARTIES TO A LEASE.

As upon purchasing land, so upon taking a lease, the first point for your consideration will be the power of the intended lessor to grant the lease. As a rule, it may be said that a person who has power to sell his land, has also power to lease it; but there are cases in which a person can make a lease although he cannot dispose of it by way of sale. We shall, therefore, in the first place consider the powers of leasing possessed by various persons who are under some disability, or who are limited owners of the land only.

I. Leases by and to Infants.

By the common law an infant may avoid a lease granted by him during his minority when he attains full age, and his heirs may do the same, if he die before that time. Nor could his guardian grant a lease which would be binding on him when he attained majority; and indeed, a guardian by nature or for nurture only, could make no better lease than one at will. (*Piggot v. Garnish.*) But an infant, on attaining twenty-one, could confirm a lease granted by himself during minority (unless it was one which was not beneficial to him, in which case it seems to have been considered void *ab initio*), either expressly or impliedly, as by acceptance of rent or by mere words only; and, according to the better opinion, the Infants' Relief Act, 1874, does not apply so as to prevent ratification in such a case. By a statute, 11 Geo. 4, c. 65, the court was empowered to make a binding lease of an infant's land, and this, even where he was only seised in fee in reversion after a life estate by the curtesy

vested in his father. (See *Re Litchford*). Later, by the Conveyancing Act, 1881, s. 41, it was enacted that "where a person in his own right seised of or entitled to land in fee or for any leasehold interest, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877."

The effect of this is, that the court may, under sect. 4, authorize leases of the infant's land on the terms in that section contained; and direct what person shall execute the lease as lessor; and the further effect will be to enable the infant or his guardian, under sect. 46, to make leases *without any application to the court*. That section enables such leases to be made by persons entitled to the possession or receipt of the rents and profits of any settled estate; and sect. 49, says, that all powers given by the act may be exercised by guardians on behalf of infants. But on reading sect. 57 a difficulty occurs. Sect. 57 provides, *inter alia*, that the provisions relating to leases authorized by the act to be made without application to the court shall only extend to settlements made after 1st November, 1856. It is difficult to see how this date is to be fixed in applying sect. 41 of the Conveyancing Act, 1881, to the Settled Estates Act.

Recourse to this act, however, will not now be frequent, for, by sect. 59 of the Settled Land Act, where a person seised of land in his own right is an infant, the land will be deemed settled land, and the tenant thereof a tenant for life within that act; and by sect. 60 the powers given thereby to tenants for life may be exercised on an infant's behalf by the trustees of the settlement, and if there are none, by such persons and in such manner as the court may order. Under that statute, as we shall see hereafter, tenants for life can make leases in different cases for terms of ninety-nine, sixty and twenty-one years. As to who are the proper persons to exercise the power of leasing conferred by the Act of 1882, see the recent case of *Re The Duke of Newcastle's Estates*, from which it seems that the consent of the infant's guardians is not necessary.

As to the power of an infant to accept a lease, he may do so, but he will be able to avoid it on attaining majority (*Ketsey's Case*), but he must make his election to do so within a reasonable time or he will become liable to pay the rent and the arrears of it, and to perform the covenants contained therein. (*N. W. Rail. Co.*

v. *MacMichael*.) And by 11 Geo. 4, c. 65, s. 12, leases to infants may be surrendered and renewed under the direction of the Chancery Division.

II. Leases by and to Persons *Non compos mentis*.

The lease of a person *non compos mentis* is apparently binding on him unless the lessee knew of his insanity and took some advantage of it (*Moulton v. Camroux*); and by 16 & 17 Vict. c. 113, the Lord Chancellor may authorize a lunatic's committee to grant leases of his estate; also under the Settled Estates Act the Chancery Division may grant leases of a lunatic's settled estates, subject to the provisions of that act. And a person *non compos mentis* may take a lease for his benefit; and a lunatic's committee may, under 16 & 17 Vict. c. 70, under the direction of the Lord Chancellor, surrender leases and take new ones. Further, by the Settled Land Act, 1882, provision is made by which leases of a settled estate of which a lunatic is tenant for life may be made (see *post*, Part IV.)

III. Leases by Married Women.

Married women can grant valid leases of property which is theirs for their separate estate, whether by law, statute or otherwise. If the property is not hers for her separate use, a lease by a married woman alone is void. (*Goodright v. Stravan*.) But a lease may be made by her, her husband concurring, and the deed being acknowledged under the Fines and Recoveries Act; and under the Settled Estates Act, 1877, husbands entitled to estates in the right of their wives may, with the leave of the court, make leases of her land subject to the provisions of that act, and without such leave they may lease it for any term not exceeding twenty-one years, the lease to take effect in possession, and otherwise to conform to the provisions of the act.

A lease of the wife's freehold land not made under the powers of any statute by the husband and wife, or by the husband alone, if by deed, will be good during the coverture; but the wife may avoid it on the husband's death, unless she confirms it either expressly or impliedly. (See *Toler v. Slater*.) It seems that if such

a lease be made by parol it will determine of itself on the husband's death, and be incapable of confirmation by the wife. (*Parry v. Hindle.*) If the husband survives the wife and becomes tenant by the curtesy, the lease will be valid till his death, if the term extend so long; but if he do not become such a tenant, it is void as against the wife's heir. (*Hove v. Scarrot.*) As to leaseholds which are not the wife's for her separate use, the husband has full power to assign or sub-lease them, and the assignment or sub-demise will be good even though the wife survive him.

As to leases to a married woman, the old law was that she might take a lease; but it would be voidable by her husband, or after his death by herself or her heirs. (See *Swaine v. Holman.*) And if she has separate property, such property would become liable for payment of the rent and performance of the conditions and covenants of the lease. If the lease be made to the husband and wife jointly, it will be good as against the wife during the life of the husband, but after his death she may avoid it; but if she assent to it after his death she will become liable for arrears of rent which became due during his lifetime.

Under the Married Women's Property Act, 1882, it would appear that a married woman can take and make a lease as if a *feme sole*.

IV. Leases by Copyholders.

Copyholders, as we have previously pointed out to you, cannot, except by a special custom of the manor, make leases for more than one year without incurring a forfeiture of their estate. But if they do make a demise for a longer term, it is not absolutely void, but will be good against all persons but the lord of the manor, who may avoid or confirm it at his option. (*Doe v. Bousfield.*) But the lord may empower his tenant to grant leases for more than a year by licence, which, however, is entirely in his discretion. (*R. v. Hall.*)

V. Leases by Reversioners.

If a remainderman or reversioner grants a lease during the continuance of the particular estate which precedes his remainder or

reversion, the lease will take effect in possession as soon as the particular estate determines.

VI. Leases by and to Corporations.

Unless they are restrained by statute, corporations may grant leases, but they must in all cases be under seal; if, however, they be not under seal, and the tenant enters and pays rent he will be able to hold as tenant from year to year on the terms of the instrument, so far as they may be applicable to such tenancy. (See *Ecclesiastical Commissioners v. Morral*.) As to ecclesiastical corporations, these are in some cases disabled from leasing, and in others empowered to do so by a number of statutes known as Enabling and Disabling or Restraining Statutes. On taking a lease from such a corporation these statutes should be consulted by you.

Municipal corporations are prohibited from granting leases for terms exceeding thirty-one years, unless they obtain the consent of the Treasury to grant longer leases, or unless the lease is a renewed one. But they may grant building leases for terms not exceeding seventy-five years. (5 & 6 Will. 4, c. 76.) Leases may be made to corporations, but they must not be of terms of very long duration. A term of 100 years has been held to bring the land into mortmain, and so incur forfeiture. (*Rowles v. Mason*.)

VII. Leases by Agents.

In the granting of a lease, it very often happens that your negotiations for it are carried on without seeing the owner of the land at all, but through the medium of a land or house agent. It becomes then important to inquire what power of granting leases such agents generally possess. If the agent has sufficient authority, a lease granted by him will bind his principal; such authority should as a rule be a power of attorney, and if he is to grant leases by deed, the power of attorney must also be by deed; and whatever form his authority be in, you must see that, in taking a lease from him, he does not exceed it, for if he does so his principal will not be bound, though he may subsequently adopt and ratify

the agent's act in writing, in which case the lease will become binding upon him. In case the agent has no authority, or, having one, exceeds it, you will not be without some remedy, for by executing a lease as agent for another, he impliedly warrants that he has sufficient authority for his acts, and if it turns out that he has no such authority, you may sue him or his representatives for the breach of such warranty. (See *Pow v. Davis*, and *Collen v. Wright*.) Another case in which you will have a remedy against the agent is where he executes the lease in his own name instead of as agent for and in the name of his principal. (See *Clay v. Southern*.) Sect. 46 of the Conveyancing Act, 1881, which you will remember enables the donee of a power of attorney effectually to exercise it in his own name, would nevertheless not seem to take away this liability, though it would make the principal liable without the necessity of having to bring in any parol evidence to charge him, which formerly had to be done in such a case. (See *Higgins v. Senior*.) As to the extent of the authority, it has been held that a land agent, as such, has no authority to enter into agreements for leases (*Ridgway v. Morton*), so that you should see that he has express power to enter into such contracts. Again, it is doubtful if a house agent has any implied power to let persons into possession, though but slight evidence will be required to show that he has express power to do so. (See *Slack v. Crewe*.) House agents for letting furnished houses whose rent exceed 25*l.* must be licensed under 24 & 25 Vict. c. 21, s. 10, but the term "house agent" under this act does not include an agent employed to manage landed estates, a solicitor or a licensed auctioneer. (Sect. 13.)

VIII. Leases by Executors and Administrators.

An executor may make a demise of his testator's leaseholds, even before probate, as he derives his power from the will, not the probate; but an administrator cannot demise before he obtains a grant of letters of administration, for it is from these that he derives his authority. And a lease by one of several executors is valid, as executors have a joint and several authority. The same remark applies to administrators. (See *Doe v. Hayes* and *Jacomb v. Harwood*,

and *ante*, p. 175.) A lease may be taken from an executor even though the term is specifically bequeathed; but if you take a lease under such circumstances you should ascertain that the executor has not already assented to the bequest, for if he has done so he has no power to grant the lease. (See *Fenton v. Clegg*.) If the executor was a married woman, the husband was formerly the person who by law had the right to administer, and he had, therefore, to be joined in the lease, and the wife alone could not make a valid lease, for she could do no act in the administration of the estate without her husband's consent. A demise by the husband alone, however, was good. But now, by the Married Women's Property Act, 1882, a married woman can accept the office of executor without her husband, and therefore will be able to make a lease, and otherwise act in the executorship as if she were a *feme sole*.

IX. Leases under Powers.

It may happen that the lessor derives his right to grant a lease from some power contained in a settlement. In accepting a lease from such a person you should see that the conditions and restrictions imposed by the power are strictly observed. It has been decided that a person acting under a power may do less than the power warrants him in doing, and if he does more it will at any rate be good to the extent of the power (see *Isherwood v. Oldknow*), so that a lease granted under a power, but exceeding it, will be good as between the lessee and the lessor, but may be void as against a remainderman or reversioner. (See *Yellowby v. Gower*.) But even where there has been a defective execution, there is a remedy provided by statute; for by 12 & 13 Vict. c. 26, s. 7, leases made under powers *bonâ fide*, and under which the lessees have entered, but which are invalid by reason of some deviation from the terms of the power, will be deemed in equity to be contracts for such leases as might properly have been granted; and by 13 Vict. c. 17, if the persons against whom such leases are invalid accept rent, and before or on its acceptance sign any receipt, memorandum or note in writing confirming the lease, the lease will be deemed to be confirmed against them.

X. Leases under the Settled Estates Act, 1877, and the Settled Land Act, 1882.

Under the first of these acts the Chancery Division of the High Court may authorize leases of settled estates for any length of time; but such leases must be granted subject to certain conditions, *e.g.*, they must take effect in possession, or within a year from the making thereof; must not exceed, for an agricultural or occupation lease twenty-one years (thirty-five years in Ireland), for a mining lease forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years; but the court may grant longer leases than those specified where such is shown to be the custom of the district, and it thinks it beneficial to the inheritance, except agricultural leases, which cannot be granted for longer than twenty-one years (thirty-five years in Ireland). Further, the best rent must be reserved, to be payable half-yearly, and nothing in the nature of a fine is to be reserved; the felling of trees must not, except in special circumstances, be authorized; and the lease must be by deed, and the lessee must execute a counterpart, and there must be a condition for re-entry on non-payment of rent for twenty-eight days or less. The court may also authorize preliminary contracts to grant leases of the above nature, and the power to authorize the leases may be exercised either by approving of particular leases or by vesting powers of leasing in conformity with the provisions of the act in the trustees of the settlement. And when a lease is approved of, the court may direct what person shall execute the same as lessor. Application to the court must be made with the consents of certain persons mentioned in sect. 24, but this consent may be dispensed with in particular cases. (See sect. 25.) If the specified persons do not consent to or concur in the application, notice must be given to them, but this notice may also be dispensed with under certain circumstances. (See sects. 26—29.)

Further, under the same act, tenants for life and the other persons who are thereby included in the definition of a tenant for life may, when the settlement is made after the 1st November, 1856, and contains nothing to the contrary, without any application to the court, demise their lands, except the principal man-

sion house and the demesnes thereof, for any term not exceeding twenty-one years, the lease to take effect in possession or within a year from the making thereof; to be by deed; to reserve the best rent without any fine; to be without impeachment for waste, and to contain covenants for the payment of the rent, and other usual and proper covenants, and also a condition for re-entry in the case of the rent being in arrear for twenty-eight days; and further, a counterpart of every such lease is to be executed by the lessee. (Sect. 46.) All such leases will be valid against the persons granting them, and all other persons entitled to estates subsequent to them under the same settlement, if the lands are settled, and if not, against the wife of any husband who grants a lease of land to which he is entitled in her right, and against all persons claiming through or under the wife or husband of the person granting the same. (Sect. 47.) And the execution of any lease by the lessor is to be deemed sufficient evidence that a counterpart has been duly executed by the lessee. (Sect. 48.) This act, however, does not free a copyholder from the necessity of having to obtain the consent of the lord of the manor to a lease which exceeds a term of one year in duration. (Sect. 56.)

Under the Settled Land Act, 1882, a tenant for life (which includes tenants in tail; tenants in tail who are barred by act of parliament from defeating or barring their estates tail, and although the reversion is in the crown, provided the lands were not granted by act of parliament for public services; tenants in fee with an executory limitation over; persons entitled to a base fee, though the reversion is in the crown; tenants for years determinable on a life; tenants *pur autre vie*; tenants in tail after possibility of issue extinct; tenants by the curtesy; and any person entitled to the income of land under a trust or direction for payment to him during his own or any other life), whatever the date of the settlement, and notwithstanding any provision therein to the contrary, may lease the settled land for any term not exceeding, in the case of a building lease, ninety-nine years; in the case of a mining lease, sixty years; and in the case of any other lease, twenty-one years (or thirty-five years in Ireland); and such leases may be granted "whether involving waste or not." The lease must be by deed; must reserve the best rent, regard being had to any fine taken (which seems impliedly to confer the power of reserving or taking a fine, and which fine is by the Settled Land Act, 1884, declared

to be "capital money"); it must contain a covenant for the payment of the rent, and a condition for re-entry if the rent is thirty days in arrear; and a counterpart must be executed by the lessee and delivered to the tenant for life.

And it is further provided, that a statement contained in the lease or endorsed thereon respecting any matter of fact or of calculation under the act in respect of the lease shall, in favour of the lessee and those claiming under him, be sufficient evidence of the matters stated, a provision which will prevent the making of requisitions as to whether the tenant for life has properly exercised his powers. Special provisions are made as to the conditions upon which building and mining leases may be granted, and for these you must consult sects. 8 to 11. Sect. 12 enables the tenant for life to carry into effect a contract for a lease entered into by his predecessor in title to renew leases, and to confirm them; and by sect. 13 he may accept the surrender of a lease with or without consideration, and on surrender of part of the land only the rent may be apportioned, and any new or other lease may be granted which may contain additional land. By sect. 14 the tenant for life may grant to copyholders licences to lease in the same manner as he himself is entitled to do under the act with respect to freehold lands. And lastly, before entering into such a contract, the tenant for life must give a month's notice to the trustees of the settlement (of whom there must be two), and also to their solicitor, if known to him, of his intention to make the lease. (Sect. 45.) But by sect. 5 of the Amending Act of 1884, this notice may be waived or curtailed by the trustees.

It is impossible within the limits of a work on conveyancing generally to treat of leases and conveyances of settled lands with anything like the fulness and exactitude which the subject demands: whenever you are purchasing land from a tenant for life, or taking a lease from him under the provisions of either of the two above statutes, you must have the acts themselves before you, and diligently study their provisions.

It will perhaps be useful for you to run over briefly the old law as to the powers of tenants in tail, tenants for life as to leasing, including in the latter term tenants *pur autre vie*, tenants in tail after possibility of issue extinct, and tenants by the curtesy, and in dower, whose leasing powers were very much similar to those

possessed by an ordinary tenant for life. As to tenants in tail, formerly they could not, owing to the provisions of 13 Edw. 1, c. 1, make a lease for a longer term than their own lives, any lease of a longer duration than this would be void as against those entitled after the determination of their estates. But by 32 Hen. 8, c. 28, a tenant in tail was empowered to grant leases under certain restrictions for twenty-one years, or three lives, but such leases were binding only on his issue, and not on the remaindermen or reversioners; and the rent reserved had to be such as was accustomedly paid during that period, and the lessee was not to be exempted from impeachment for waste. Later on, by the Fines and Recoveries Act, a tenant in tail was enabled, by a deed duly enrolled under that act, to grant a lease for any length of time, which would bind both the issue and the remainderman and reversioners; and further, to grant leases for twenty-one years, to take effect within at least twelve months after date, and by which a rent of at least five-sixths of a rack rent was reserved, without the necessity of enrolment. Thus the law continued till 1856, when the 19 & 20 Vict. c. 120, was passed, which, *inter alia*, repealed the statute of 32 Hen. 8, and which was itself superseded by the Settled Estates Act, 1877.

As to *tenants for life*, they could not make any lease to take or continue in effect after their decease; such a lease would be absolutely void and incapable of confirmation. (*Doe v. Butcher.*) But in such cases the acceptance of rent by the reversioner or remaindermen might amount to evidence of a new tenancy from year to year on the terms contained in the lease granted by the tenant for life so far as they would apply. (See *Cornish v. Stubbs.*)

As to the powers which these limited owners have under the Settled Estates Act, 1877, and the Settled Land Act, 1882, we have already seen what they are, and it is only necessary to point out that while a tenant in dower is expressly included under the former act, she is not referred to in the latter statute.

Tenants for years, unless restrained by express agreement, may make underleases of their lands, and a tenant from year to year may make a lease for a term of years which will last until his own term expires; or he may underlet from year to year. And, in

both cases, he will have a sufficient reversion in him to enable him to distrain for rent. (See *Pike v. Eyre.*) As to a tenant at will, if he makes a lease it operates to determine his own estate at will, but nevertheless such a lease will be good as against himself by estoppel. (*Doe v. Carter.*) The same rule applies to a tenant at sufferance.

XI. Leases by Mortgagors and Mortgagees.

We have already discussed the leasing powers of these persons. (See *ante*, Part II.)

CHAPTER II.

THE FORM OF THE LEASE.

I. As to the necessity of a Deed.

It is unnecessary to do more than remind you that by the joint effect of 29 Car. 2, c. 3, ss. 1 and 2 and 8 & 9 Vict. c. 106, s. 2, leases must be made by deed, with the exception of terms not exceeding three years from the making thereof, and reserving a rent of at least two-thirds of the annual value of the land, which are valid though made by parol. But it is not using too strong language to say that these statutes, and especially the latter one, have practically been, to a great extent, set aside by the decisions in various cases. For, first of all, it was held that where a lease was void under these statutes, and the lessee had entered into possession, and had paid or agreed to pay the rent, or any part thereof, he becomes a tenant from year to year upon the terms of the void lease or agreement for a lease, so far as they are not inconsistent with such a tenancy. (*Doe d. Rigg v. Bell.*) And, secondly, where there was a demise in writing, but which, not being under seal, was therefore void as a lease, it was held that when the tenant had entered into possession and paid rent, the demise would be good as an agreement for a lease (*Lee v. Smith* and *Bond v. Rosling*), and that the tenant would hold as tenant from year to year upon the terms of the agreement, so far as applicable to such a tenancy. And, thirdly, in the recent case of *Walsh v. Lonsdale*, it has been held that by the effect of the Judicature Acts, in such a case as the last, the tenant holds not merely as a tenant from year to year, but he is to be treated in every court as holding upon the terms which he would have held had he received a valid lease in pursuance of the agreement; so that a distress for the non-payment of an instalment of rent which, by the agreement, was payable in

advance, was allowed in that case. This case, you will observe, constitutes the tenant a tenant under the agreement even before he has paid the rent, or any part of it; and the general result of it would seem to be that an agreement for a lease is, if duly made in writing and followed by entry of the tenant, as reliable an instrument, as far as regards the validity of the tenancy, and as effectual an instrument, as a deed, and under it the lessor can exercise the same rights as if the lease had actually been granted. And as the stamp duty on agreements for leases, when the term exceeds thirty-five years, is less than the duty payable on a lease by deed for a similar term, it may, in many cases, be of advantage to create the lease by agreement, and thus effect a considerable saving in expense. But of course there is this great objection to a mere agreement, that you cannot get covenants in it upon which you will have a right to sue for twenty years.

An agreement for a lease must, under the 4th section of the Statute of Frauds, be in writing, however small the length of the term to be granted by the intended lease is, or else it will not afford ground for an action for damages; nor will it be specifically enforced unless taken out of the statute by part performance by the lessee of such a character as to render it impossible for him to be restored to his original position. (See *Williams v. Evan.*) And even where there is a written agreement which satisfies the statute it will not be specifically enforced if it omits to specify the time from which the term is to commence (see *Marshall v. Berridge*); and an agreement for a lease which, if granted, might immediately be determined under a proviso for re-entry, will seemingly not be enforced, but the decisions on the point are somewhat conflicting. (See *Jones v. Jones*; *Gourlay v. Duke of Somerset*; *Lillie v. Leigh.*) Nor will specific performance be granted of an agreement for a lease from year to year merely (*Clayton v. Illingworth*), or for a lease when the term contracted to be granted has expired, or will expire before the judgment in the action for specific performance can be obtained. (*Nesbitt v. Meyer.*)

II. The Contents of the Lease.

The lease is usually prepared by the solicitor of the lessor at the expense of the lessee (*Smith v. Clegg*); but if the lessor requires a

counterpart to be executed, it will, in the absence of stipulation, be prepared at his own cost.

As to the date and parties to the lease, it does not seem to be necessary to add anything further here to what we have already said on the point in treating of these subjects in a previous chapter.

(1) *Recitals.*

Recitals are seldom contained in leases, but they may be made use of in some cases; for instance, when you are granting an underlease and the lessee is prohibited from granting one without the licence of the lessor, it may be advisable to recite the fact that such licence has been obtained.

(2) *The Consideration.*

This is generally stated to consist of the rent reserved, and the covenants and conditions to be observed and performed by the lessee.

(3) *Operative Words.*

It is not necessary to use any special or formal words, for any words will be sufficient which explain the intent "that the one party shall divest himself of the possession, and the other come into it for a determinate time." (Bac. Abrid.) We have already mentioned that the word "demise" creates an implied covenant for quiet enjoyment, and discussed the nature of that implied covenant. (See *ante*, p. 158.)

(4) *Parcels.*

And as to the parcels it does not seem necessary to add anything further to the remarks we have already made on the subject at p. 152.

(5) *The Habendum.*

The office of the habendum is to specify the quantity and quality of the lessee's estate. And here the legal points as to the time of the commencement and end of the tenancy will require your consideration. The rule is, that the commencement of the term and its duration must be clearly shown. The term may commence at

a present, a past or a future date. If it is to commence from the date of the lease, or from the day of date, the day mentioned will be held to be included or excluded according to the intention of the parties as appearing from the instrument. (*Pugh v. Duke of Leeds.*) If the lease has no date, or an impossible one, as the 30th of February, the term will commence from the delivery of the deed. (See *Steele v. Mart* and *Clayton's case.*) But if a day of date be mentioned, the term will commence from that day and not from the delivery of the deed. (*Styles v. Wardle.*) If no date is mentioned, and the lease is not by deed, the term will commence upon the entry of the lessee. (*Kemp v. Darrett.*) But this rule may be controlled by the circumstances of the case, as it was in *Doe v. Stapleton* and *Sandill v. Franklin.* Again, the day from which the term is to commence may be a past day, *e.g.* the lease may be dated the 19th July, 1851, and the habendum be to hold from the 25th December, 1849, for a specified term, and in such a case the term will run from the date mentioned in the habendum. (*Bird v. Baker.*) But under such a lease the tenant would not be liable for breach of covenants committed before the date of the lease. (*Jervis v. Tomkinson.*) Further, the day for the commencement of the term may be one which has not yet arrived, *e.g.* one year after the date of the lease: in this case the grantee does not become at once a lessee, strictly so called, but has merely an *interesse termini* in the land, a right which may be assigned by him, but which till he has entered into possession gives him no estate in the land; so that, for instance, he could not before entry maintain an action for trespass; and this would be the case even though the lease was made by bargain and sale and money payment, and so made to operate under the Statute of Uses, which statute, by executing the use, nominally puts the lessee in possession without actual entry. (See *Geary v. Bearcroft.*)

Secondly, the duration of the term, or, in other words, the time for its expiration, must be fixed; so that if a lease is made to A. for as many years as B. shall live, this will not create a term of years, for it is uncertain how long B. may live. But a term may validly be granted for 999 years if A. shall so long live; for here an ascertained period is stated upon which the term must come to an end. And we may remark here that a difference will be made by the use of the word "and" in the one case, and the word "or" in

the other; for a lease for a term of years, if A. and B. shall so long live, will determine on the death of the first of the two who dies; but if “or” had been used instead of “and” the term would continue until the death of the survivor. (*Vaux’s case.*)

With regard to the duration of the term you should note the following points:—A lease “for years,” without specifying the number of years, will be a lease for two years; and a lease “for one year, and so on from year to year,” will be a lease for two years at least. (*Doe v. Green.*) When an option is given to determine the lease before the term expires of itself, and it is not stated who is to have that option, it will be the lessee alone who can exercise it, for the rule is, when the words are doubtful, that they shall be construed most strongly in favour of the grantee. (See *Doe v. Dixon.*) And where a lease was for twenty-one years, determinable, nevertheless, in seven or fourteen years, “if the parties shall so think fit,” it was held that both parties must concur in exercising the option. (*Fowell v. Franter.*)

(6) *The Reddendum.*

We next come to the reddendum, which states the amount of the rent reserved and the times at which it is to be payable. It is not within our scope to enter into a dissertation on the nature of rent; but we may here note that while it need not necessarily consist of money, but may be of labour, provisions, services and the like, yet it must not consist of part of the profits of the thing demised, *i. e.* it must not be something excepted from, but something newly created or reserved out of the premises. (See *Doe v. Lock.*) Secondly, rent must be reserved out of something upon which a distress can be made in case it is not paid; so that, as a rule, rent cannot be reserved out of an incorporeal hereditament; and, thirdly, rent must be reserved to the lessor and not to a stranger. (See *Oates v. Frith.*) The safest way, however, of reserving the rent is to make no mention at all of the person to whom it is reserved, for it will always be incident to the reversion and payable to the holder thereof from time to time without express mention. (See *Whitlock’s case.*) And lastly, the rent must be certain in amount; but to the expression “certain” the maxim “*Id certum est quod certum reddi potest*” applies, so that the actual amount

need not be set down in so many words if some clue is afforded by which the exact amount may be ascertained.

(7) *Covenants by the Lessee.*

The first point which you may require to be satisfied on under this head will be the question as to what covenants are implied by law. As we have already seen, the use of the word "demise" imports into the lease a covenant for quiet enjoyment, and the words "yielding and paying" in the reddendum imply a covenant on the lessee's part to pay the rent. (See *Hellier v. Casbard.*) But further, the law annexes by implication to every lease undertakings by the lessor that the lessee shall have the right to enjoy the premises free from interruption, so that in a case where there is no covenant for title the lessee, if evicted by some person having a better title than the lessor, may sue the lessor for indemnification. (*Style v. Hearing.*) And this will be the case even when the demise is by parol only. (See *Bandy v. Cartwright.*)

Besides the covenants implied by the use of particular words on a bare agreement for a lease, though nothing is said as to what covenants the lease shall contain, the law imports into it certain covenants. These are nearly co-extensive with what are known as "usual" covenants, and include, in addition to covenants to pay the rent, covenants by the lessee to pay the taxes (except landlord's taxes); to keep and deliver up at the end of the term the premises in good repair, and in certain cases to permit the lessor to enter and view the state of the premises and repairs.

As to the implied covenant to pay taxes. The property tax is payable by the landlord, and he cannot, even by express contract, throw the burden of it on the tenant; for if the tenant pays it he may deduct it from his next rent, and the lessor is bound under a penalty to allow the deduction, and any agreement to pay the rent in full without allowing such deduction will be void. (5 & 6 Vict. c. 35, ss. 73, 103. See hereon *Lamb v. Brewster.*) Again, taxes which will, in the absence of agreement, fall on the landlord are the land tax (38 Geo. 3, c. 5), sewers rate (see *Palmer v. Erith*), poor rates, where the premises are not let for a longer term than three months (32 & 33 Vict. c. 41), rent-charge in lieu of tithes (*Griffiths v. Daubuz*). Other rates, as a rule, fall on the tenant. But even without express stipulation a tenant may become liable to

pay all rates and taxes but property tax. This will be the case if a "net" rent or a rent "free from all deductions" is reserved. (See *Bennet v. Womack*; *Parish v. Sleeman*.)

As to the implied covenant to keep in repair, this is a corollary to the rule that a tenant for years must not commit waste. As to a tenant from year to year, he is liable for that kind of waste known as voluntary waste; but he is only liable in a limited extent for permissive waste, and he is not bound to keep the premises in repair any further than to keep them wind and water tight (see *Leach v. Thomas*), and he would not be bound to repair the premises if they were burned down. (*Horsefall v. Mather*.) The implied liability of tenants for fixed terms of years to repair, in the absence of any stipulation, has seldom been raised in the courts; for leases for terms of years, in all cases, are furnished with express covenants on the subject, so that the implied liability, and its extent, has received but scant judicial interpretation. It has been questioned if they are liable at all for mere permissive waste (see *Herne v. Bembow*); but a later case seems to show that they would be liable for such waste. (See *Yellowby v. Gower*.) In any case they are liable for voluntary waste. But they would probably not be liable to repair the premises, if they were destroyed by storm or act of God; and by 14 Geo. 3, c. 78, if the premises are destroyed by accidental fire, the tenant will not be liable, but he can apparently make himself liable by contract, as agreements between landlord and tenant are excepted. This statute, however, does not apply when the fire has been caused by negligence. (*Filliter v. Phippard*.)

The lessor, we may here remark, is under no implied obligation to repair (*Gott v. Gandy*), or to rebuild if the premises are destroyed by fire, even though he has covenanted for quiet enjoyment. (*Brown v. Quilter*.) Nor is there any implied covenant on his part that the premises are habitable (*Hart v. Windsor*), or fit for the purposes for which they are required (*Manchester Bonded Warehouse Co. v. Carr*), unless the subject of the lease is a furnished house, when there is in certain cases an implied condition that it is fit for habitation. (*Smith v. Marrable*, *Wilson v. Finch-Hatton*, and *Bird v. Greville*.) But in *Cheston v. Porcell* it was held that this rule did not apply in the case of a lease for as long a term as seven years, but only in respect of letting of furnished houses for short terms or as lodgings.

As to the implied covenant for the landlord to enter and view the

state of repair, this only applies when the tenant has covenanted to do repairs. (See *Saner v. Bilton*.) For the landlord has no right to go on the premises to make repairs in the absence of stipulation. (*Barker v. Barker*.)

The 7th section of the Conveyancing Act, 1881, which you will remember enables you to omit express mention of the usual covenants for title in certain cases, does not apply to demises for years at a rent, so that if the lease is to contain such covenants they must be expressly inserted; but it is not usual for the lessor on granting a lease to covenant for title further than to give a covenant for quiet enjoyment.

A further point with regard to the implied covenants is, How far and upon whom are they binding? The rule is, that covenants, which are implied by the law, run with the land, and the liability to perform them will attach to the holder for the time being of the land. But this rule only applies to covenants which the law implies, such as the covenant for quiet enjoyment, which arises from the employment of the word "demise," and does not necessarily extend to those covenants which are not, strictly speaking, implied by law, but only differ from express covenants in that the meaning of the parties is obscurely expressed, but which are referable to a tacit agreement between them. (See *Williams v. Burrell*.) And lastly, implied covenants only bind the covenantor so long as he retains possession of the estate; if he parts with it, his liability under them as to future breaches is gone. (See *Hartley v. King* and *Taylor v. Shum*.) The rule with regard to express covenants is, as you know, that the lessee or lessor remains liable on them, even after he has assigned the term or reversion. (See *Auriol v. Mills* and *Thursby v. Plant*.)

It is seldom, however, that the implied covenants are relied on by the parties, and in drawing a lease you should always insert express conditions. These, when employed, will nullify the effect of the implied covenants, for the rule is, that "*expressum cessare facit tacitum*." Thus the implied covenant for quiet enjoyment may be diminished in effect by an express one. (See *Merril v. Frame* and *Stanley v. Hayes*.)

Before commenting on the various express covenants which you should insert in a lease, it will be well to consider how far these covenants are binding on the covenantors, and the effect on them of the assignment of the lease, or of the reversion. There is a

distinction in this respect between covenants which do, and covenants which do not, run with the land. One which runs with the land is, as you know, the liability to perform which, or the right to take advantage of which, passes upon an assignment. At common law covenants ran with the land, but not with the reversion, so that on an assignment of the reversion the assignee was not able to take advantage of the covenants which the lessee had entered into with the lessor. But now, under 32 Hen. 8, c. 34, the assignee of the reversion can sue on the covenants of the lease (if at any rate it be under seal: *Brydges v. Lewis*) as fully as the original lessor, and the same rule applies to assignees of the term. (*Elliot v. Johnson*.) And further, by the Conveyancing Act, 1881, s. 10, the rent reserved by the lease, if made after 1881, and the benefit of every covenant and provision therein, having reference to the subject-matter of the lease to be observed and performed by the lessee, and every condition of re-entry and other condition therein, is to be annexed to and incident to the reversion; and a similar provision is made by sect. 11, that in leases made after 1881, the obligation of a covenant entered into by the lessor, and having reference to the subject-matter of the lease, shall, as far as he has power to bind the reversionary estate immediately expectant on the term, be incident to that reversionary estate; and each of these sections contains a provision that the assignee of the reversion in the one case shall have the right to enforce and take the benefit of the lessee's covenants and conditions, and that the lessee in the other shall have the right to enforce and take the benefit of the lessor's covenants against the assignee of the reversion, notwithstanding that the reversionary estate is severed. The event of severance of the reversion had already been provided for as far as regards *the condition of re-entry for non-payment of rent*, but no farther, by sect. 3 of 22 & 23 Vict. c. 35. Before that act, a grantee of part of the reversion expectant on a lease could not take advantage of any condition in the lease; for it was a theory of the law that a condition was not divisible or apportionable. (*Dumpro's case*.) By sect. 3 of 22 & 23 Vict. c. 35, it was provided that, where the reversion was severed and the rent legally apportioned, the assignee of each part of the reversion should have the benefit of all conditions or powers of re-entry *for non-payment of rent* just as if those conditions had been specially reserved to him to secure the pay-

ment of the portion of the rent to which he became entitled after the assignment. This provision, then, is extended by the latter parts of sub-sect. 1 of sect. 10, and sub-sect. 1 of sect. 11, to *all* conditions, and it applies even when the rent has not been legally apportioned. Both these sections only apply to leases made after the commencement of the act.

Sect. 12 makes a provision as to the apportionment of conditions on severance of the reversion expectant on any lease, and enacts that where the reversion is severed the conditions of re-entry, &c. contained in the lease shall be apportioned, and that the owners of each part of the severed reversion shall be able to take advantage of them as if each severed reversionary estate had been the only reversionary estate expectant on the lease. It contains similar provisions that the conditions are to be apportioned in cases where part only of land comprised in a lease has been forfeited and another part remains subject to the lease. Here the lessor may take the benefit of the condition of re-entry (which, by the terms of the lease, related to the whole of the land, part of which has been forfeited, and which, as conditions were not formerly apportionable, would have been lost by such forfeiture) by entering on the part of land which still remains unforfeited. This section extends sect. 3 of 22 & 23 Vict. c. 35, which, as before mentioned, only related to conditions of re-entry for non-payment of rent, and only when the rent had been legally apportioned.

The rule then is, that all express covenants which run with the land will bind the assignee, or may be taken advantage of by him although he is not named. (*Martyn v. Clue.*) As to what covenants run with the land, we must refer you to *Spencer's case*, and the notes which you will find appended thereto in 1 Sm. L. Cas. 60. Thus the covenants by the lessor for quiet enjoyment, for further assurance, for renewal, and as to repair, will bind the assigns, though they be not mentioned; and so will the lessee's covenants to pay rent, to repair, to cultivate the land in some particular way, to reside on the land, to insure, and other covenants of a similar nature. Again, though the covenant is one which does not run with the land, yet the assign may in some cases be bound by being expressly named; but this will only be the case with covenants to do something new upon the land demised, as, for instance, to build a wall or a house on it, or a covenant not to assign without licence. (*Williams v. Earle.*)

Lastly, there are some covenants which will not bind the assigns, even when they are expressly mentioned. Such covenants are those which relate to something wholly collateral to the land demised, as a covenant to build a wall on some other land of the lessor's not comprised in the demise. (See *Spencer's case*.)

But you must bear in mind the important point that the lessee may in some cases be bound by covenants which do not run with the land, and that the assignee of a lease may be similarly so bound, though the covenant is one in which the assigns are not expressly mentioned; for a covenant which does not run with the land will nevertheless be binding on the lessee if he has notice of it. So that if the lessor has entered into any restrictive covenants with the lessee, *e. g.* that the adjoining land shall not be built upon except in a particular manner, a purchaser of the adjoining land from such lessor will be bound by that covenant if he has notice of it. (See *Tulk v. Moxhay*.) And as the law deems that an intended lessee is to be taken in all cases as having notice of the lessor's title, he will be bound by any restrictive covenants which the latter has entered into with owners of adjoining property, so far as they bear on the enjoyment of the property demised. (See *Wilson v. Hart* and *Patman v. Harland*.) And the assignee of a lease who has, at the time he acquired his interest in the premises, notice of any covenant affecting the premises, will be bound by that covenant. (See *Luker v. Dennis*.) And an under-lessee and his assigns are bound by covenants in the head lease if they had a fair opportunity of inspecting it. (*Hyde v. Warden*.) And an under-lessee will be bound by covenants in the assignment of the original lease, although he has had no notice of them, and although the person to whom the covenant was made has no reversion. (*Clements v. Wells*.)

As to the wording of express covenants, it will now be unnecessary, in consequence of sects. 10 and 58 of the Conveyancing Act, 1881, to add the words "heirs, executors, administrators, and assigns," after the name of the covenantee; and, in consequence of sect. 59, the words "heirs, executors and administrators," after the name of the covenantor; and, in consequence of sect. 11, the lessor need not expressly bind his assigns. As to the question whether the lessee should covenant for his assigns, we have seen that his assigns will be bound, though not named, except where the covenant is one which concerns a thing not *in esse* to be done on the land demised. Here the assigns will be bound only when mentioned,

or if they have notice. (But it has been doubted if they will be bound by such covenants even if mentioned: see *Minshall v. Oakes*.) But, as assignees of leases will nearly always have notice of the lessee's title, the word assigns might be omitted, but perhaps it is the better course to bind the assigns by expressly mentioning them.

Sometimes the parties have agreed that the lease shall contain all usual and proper covenants and provisoes. It will then be your duty to ascertain what is meant by "usual" covenants, &c. When a dispute arises between the parties as to what is to be included under this expression, it becomes a question for a jury to settle the meaning of the word "usual." (See *Bennett v. Womack* and *Brookes v. Drysdale*.) Some covenants have been clearly settled by law to come within the description of "usual covenants," while others may be "usual" with reference to some custom of the district in which the premises are situate, or by the custom of some particular trade, or by other circumstances. The following covenants are clearly usual:—A covenant by the lessor for quiet enjoyment till default. (*Hall v. City of London Brewery*.) Covenants by the lessee to pay the rent and tenant's taxes, to keep and deliver up the premises in good repair and to permit the lessor to inspect them, to cultivate the land in accordance with good husbandry, and a condition of re-entry for non-payment of rent, are usual conditions. But a proviso that, if the premises are destroyed by fire or tempest, the lessor shall repair, or else the lessee shall be at liberty to quit the premises and be discharged from the payment of rent, is not a usual one. (*Doe v. Sandham*.) Nor are the following usual covenants or provisoes:—A clause for forfeiture or re-entry on the bankruptcy of the lessee (*Hyde v. Warden*), or on the breach of any of the covenants (*Hodgkinson v. Crowe*); a covenant in restraint of trade (*Propert v. Barker*); a covenant not to assign without licence (*Hampshire v. Wickens*; *Church v. Brown* and *Henderson v. Hey*); a covenant to leave assignments and underleases with the lessor's solicitor for registration (*Brookes v. Drysdale*); a covenant on the lease of a public-house that the tenant shall do nothing to forfeit the licence (*Mawe v. Hindmarsh*); a covenant to insure. (See *Cosser v. Collinge*.) And where the lessee agreed to covenant to keep the premises in good repair, it was held that he was not entitled to have the general covenant qualified by the words "damages by fire or tempest only excepted." (*Sharpe v. Millington*.)

We now propose to examine the rights and liabilities of the parties under some of the more usual covenants somewhat more in detail.

Covenant to pay Rent.

Rent becomes due on the first moment of the day appointed for payment thereof, and if it is not paid by midnight of the same day it becomes in arrear. (*Dibble v. Bowater.*) But before the lessor can re-enter for non-payment of rent he must make a demand for it before sunset so as to enable the tenant to have sufficient light by which to count the money (*Duppa v. Mayo*), but see *post*, p. 303. The payment should be made in cash, but any other mode of payment will be good, *e.g.*, by cheque or by post if it is authorized by custom, or by the previous course of dealing between the parties. (See *Hough v. May.*) But even where a bill of exchange, promissory note, or a bond is given in payment, the debt arising out of the liability to pay the rent is not thereby extinguished or merged therein, so as to supersede the lessor's right to distrain. The proper place to make the payment is upon the land or premises demised; but if there is an express covenant to pay the rent, it is the duty of the tenant to seek the landlord out, wherever he may be, and to make the payment to him. (*Haldane v. Johnson.*) The payment should be made to the lessor in person, or to his authorized agent, or at least to a person to whom the tenant has previously paid it, with the approval, tacit or express, of the landlord, and a payment to his wife will not be good unless the lessee can show that she had his authority like any other agent to receive it. (*Brown v. Powell.*) If the lessor mortgage the premises subsequent to the demise, the lessee can nevertheless go on paying the rent to him until he receives notice from the mortgagee requiring the payment to be made to him. (*Trent v. Hunt.*) As we have seen, the tenant may deduct any property tax which he has paid from his next rent; and so also if called upon to pay any tax or rate which, though leviable in the first instance on the occupier of the premises, is ultimately payable by the landlord, he may deduct these; but in all cases the deduction must be made from the instalment of rent paid next after the payment of such taxes or rates. They cannot be afterwards deducted or even recovered from the landlord by action. (*Cumming v. Bedborough.*) Even where the premises are destroyed by fire the tenant, in the absence of stipulation, must pay the rent in full (*Pindar v. Ainsley*), and

for this reason you should, in the interests of the tenant, always take care to exempt him by express contract from this liability. But the rent will be entirely suspended if the tenant is evicted by the landlord until such time as he is reinstated into possession. Under the covenant for the payment of rent the landlord's remedy is by action. He has, in addition to this, a more efficacious remedy at common law—by distress. But he cannot exercise both these rights concurrently. If he has distrained he cannot sue on the covenant until he has realized the distress, even though it is insufficient to satisfy the rent. (*Lehain v. Philpott.*) But if after the completion of the distress it be found insufficient he may then sue on the covenant for the balance. (*Lear v. Edmonds.*) Six years' arrears of rent may be recovered (3 & 4 Will. 4, c. 27), and the action may be brought at any time within twelve years after the rent became in arrear. (36 & 37 Vict. c. 57.)

As to the remedy by distress, we must refer you for details to some work specially treating of the subject of landlord and tenant, such as those of Woodfall or Smith. The limits of our work will not permit us to do more than to enumerate in the briefest manner the following points on the subject:—

(1) There must be an actual existing demise at a fixed rent to make the right available. But the case of *Walsh v. Lonsdale*, which we have already referred to (*ante*, p. 278), shows that a distress can be made under a mere agreement for a lease if the tenant has entered.

(2) The lessor may distrain so long only as he has a reversion in himself. If he assigns his reversion he cannot distrain for arrears due before the assignment.

(3) Certain things on the demised premises are absolutely protected from distress, and certain other things are conditionally privileged, *i.e.*, they cannot be taken if there is other sufficient distress upon the premises. In the first class come animals *feræ naturæ*, things in actual use, things belonging to a third party, but left with the tenant to be wrought on in the way of his trade, fixtures, perishable articles, loose money, things *in custodia legis*, the goods of a lodger.

In the second class come the instruments of a man's trade or profession, and beasts of the plough, sheep and implements of husbandry.

The only one of these privileged articles on which we shall offer

any remarks is goods of a lodger. These were not privileged at common law, and may *prima facie* be seized at the present day; but, by 34 & 35 Vict. c. 79, if a lodger's goods are seized for arrears of rent due from his immediate landlord to the superior lessor, the lodger may serve the last named with a notice in writing setting forth that the tenant in default has no right to the goods seized, but that they belong to the lodger; and also setting forth what rent the lodger owes to the tenant: and he may then pay to the superior landlord the rent he so owes, and, if the distraining lessor thereafter seizes his goods (which are to be specified in an inventory annexed to the declaration), he will be guilty of an illegal distress, and the lodger may obtain restitution of the goods by applying to a stipendiary magistrate or to two justices, and may also sue for damages. A person may be a "lodger" though his landlord occupies only a room in the basement and some attics. (*Phillips v. Henson.*) It has been recently held that the lodger must, to protect himself, give this declaration each time his goods are seized. (*Thwaites v. Wilding.*)

Animals being agisted could formerly be distrained; but now, by the Agricultural Holdings Act, 1883 (which only applies to agricultural and pastoral holdings and to holdings held as market gardens), they are privileged *sub modo*, that is to say, they cannot be taken until after other goods available having been exhausted, and then only for what is due for the feeding. Under the same act animals on the premises solely for breeding purposes, and machinery on hire for use in business, are absolutely privileged.

(4) The distress must, as a rule, be levied on the demised premises. But to this rule there are certain exceptions. Thus, (a) The crown may distrain on other lands of the tenant than those demised. (b) If the lessor coming to make a distress sees cattle on the land, and the tenant to avoid the distress drives them off the land, the landlord can follow them and distrain them. (c) By 8 Anne, c. 14, and 11 Geo. 2, c. 19, if a tenant fraudulently or clandestinely remove his goods after the rent has become payable to avoid a distress, the landlord may within thirty days follow and distrain those goods wherever he may find them.

(5) A distress cannot be made till the rent is in arrear, *i. e.*, till after midnight of the day upon which it becomes payable.

(6) It must be levied during the continuance of the tenancy, or, by 8 Anne, c. 14, within six months after the expiration thereof,

provided that the landlord's title is still subsisting and the tenant is still in possession.'

(7) The distress must be made between sunrise and sunset.

(8) The entry under the distress must be peaceably effected, and an outer door may not be broken in in order to obtain access.

(9) Six years' arrears of rent can generally be distrained for, but for rent due in respect of agricultural and pastoral tenancies not more than one year's arrears can now be distrained. (Agricultural Holdings Act, 1883.)

(10) If the landlord die his personal representatives have by statute a power of distress. (See 3 & 4 Will 4, c. 42, s. 37.)

For the mode in which the distress is to be dealt with when taken, and the remedies of the tenant for a wrongful or excessive distress, we must refer you to some book specially dealing with the subject of landlord and tenant, and we will merely mention that, with regard to agricultural and pastoral tenancies and tenancies of market gardens, certain alterations in the law of distress have been made by the Agricultural Holdings Act, 1883. To this attention is called on a subsequent page. (See *post*, p. 314.)

Covenants to pay Taxes, &c.

To what we have already said on this subject (*ante*, p. 283) we have only to add a few words on the construction which has been put upon various covenants to pay taxes by the courts. A covenant to pay "all taxes" will generally extend only to parliamentary taxes, will include a rent-charge in lieu of land tax, but not parochial or sewers rates or others of like nature (see *Arran v. Crisp*); and a sewers rate does not come within the description of either a parliamentary or parochial tax. (*Palmer v. Earith*.) A covenant to pay "taxes and assessments" will not include a tithe rent-charge, but such rent-charge will be included under the words "charges" or "outgoings." (See *Lockwood v. Wilson* and *Parish v. Sleeman*.) The word "rates" will include poor rates; and the county rate will be included under a covenant to pay "parochial taxes and assessments." (*R. v. Aylesbury*.) Water rate is included under a covenant to pay "all rates and taxes." (*Spanish Telegraph Co. v. Shepherd*.) A covenant to pay "all duties which during the demise shall be imposed on the landlord of the premises" will include the costs of paving a street payable under the Metropolis

Management Acts. (*Thompson v. Lapworth.*) But a covenant to pay all “charges imposed on the premises” will not include the expenses of drainage works done by local authorities under the Public Health Act, 1875, as such expenses are imposed by the act on the landlord personally and not on the land. (*Rawlins v. Biggs.*) Where the tenant is empowered to deduct sewers rate and land tax, and he builds on the land so as to increase its rateable value, he can only deduct the rate and tax on the original rent. (*Smith v. Humble*; and see *Watson v. Home.*) A covenant to pay “sewers rate, main drainage rate, and all other taxes, rates, impositions and outgoings whatsoever to be charged on the premises,” will not bind the tenant to pay the costs of paving done by a local board under the Public Health Act, 1875. (*Hill v. Edward.*)

The Covenant to Repair.

We have already seen what are the obligations of the lessor and lessee respectively with regard to repairs in the absence of stipulation. We now have to discuss in brief their liabilities under an express covenant to repair; these will depend, in a great measure, on the wording of the covenant.

(1) *The Covenant to Repair by the Landlord.*—When he expressly covenants to repair, the covenant of course carries with it the right to enter on the land and remain there for a reasonable time to execute the repairs. (*Saner v. Bilton.*) If he covenants to repair the inside of the demised premises he cannot be sued for breach of the covenant until he has had notice of the want of repair, and has thereupon neglected to make them, and this although the covenant contains no stipulation as to notice. (See *L. & S. W. Rail. Co. v. Flower.*) And the fact that the landlord omits to make repairs which he has covenanted to make does not give the tenant a right himself to make the repairs, and then deduct what he has paid for them from his rent (*Weigall v. Waters*), nor does it give him any power to quit before the end of the term or without giving notice where that is necessary. (*Surplice v. Farnsworth.*)

(2) *The Covenant to Repair by the Tenant.*—This will vary with the nature of the property comprised in the lease; but as a rule it

only applies to cases of leases of houses or buildings. Under a covenant to repair the tenant's liabilities depend upon the condition of the building at the time of the commencement of the demise. For where an old and dilapidated building is leased the covenant to repair is not to be construed as meaning that the lessee shall restore it in a renewed form at the termination of his tenancy, nor even that he shall restore it in the same condition as that in which he found it; for an allowance is made for the decay resulting as a natural effect of time and the elements (*Guteridge v. Munyard*); but all the tenant will have to do is to make such substantial repairs as are necessary to maintain the building standing. But if the covenant were to "keep and *deliver up* in good repair," he must deliver up the old premises in as good repair as he found them, and no allowance is then to be made for the ravages of time and weather. (*Payne v. Haine.*) And the tenant will be liable for dilapidations under this covenant, even though the landlord pulls down the building at the end of the tenancy, and so suffers no real injury. (*Inderwick v. Leach and others.*) And further, if the covenant is "to put the premises *in habitable* repair," then he might possibly have to deliver them up in a better state than that in which he found them; for he must make them reasonably fit for the occupation of that class of persons likely to inhabit them. (*Belcher v. Mackintosh.*)

As to the extent of the covenant to repair, if it be a general one, it will comprise all the premises on the demised land, whether existing at the date of the demise or erected subsequently. But if it be "to repair the buildings demised," this will only refer to the houses, &c. built at the commencement of the demise. (*Worcester School Trustees v. Rowlands.*) No subsequent accident or disaster will excuse the tenant from performing the covenant, so that if the premises are burned down, whether by accident, neglect or otherwise, he must not only rebuild them (*Bullock v. Dommit*) but he must also go on paying his rent just as if no fire had happened. (*Belfour v. Weston.*) And in such a case the landlord who has insured will not be compelled to contribute the insurance money towards the rebuilding of the premises. (*Leed v. Cheetham.*) But the lessee is not without remedy; for he may apply as a person interested under 14 Geo. 3, c. 78, s. 83, to the insurance company to have the money laid out in the rebuilding or repairing of the

premises, provided he make the application before the company have actually paid the moneys over to the landlord. The remedy which the landlord has, in the event of a breach of this covenant, is an action for damages; but the lease usually contains a proviso giving him a power to re-enter for forfeiture. Formerly the tenant could obtain no relief, even in equity, against a forfeiture for breach of this covenant (*Hill v. Barclay*); but now under the Conveyancing Act, 1881, sect. 14, the tenant, as we shall shortly see, can obtain relief. (See *post*, p. 304.) As to the damages for the breach of covenant, the measure of these is the injury to the marketable value of the reversion, and not the cost necessary to put the premises in repair. (*Mills v. Guardians of East London*.) A tenant is liable to pay damages for dilapidations existing at the end of the lease owing to his neglect to repair, even though the landlord's object is to pull down the premises after the expiration of the time. This was quite recently decided in *Inderwick v. Leach*.

The Covenant for Insurance.

This covenant is generally inserted in leases of houses and buildings of any description. It is sometimes stipulated that if the lessee when he covenants to insure makes default in paying the premiums, the lessor shall have power to pay them and to recover the same, with expenses, by distress, as if they were rent in arrear. But such a power of distress would most probably incur the unpleasant necessity of registering the lease, like a bill of sale, under sect. 10 of the Bills of Sale Act, 1882. Another alternative is to secure the payment of the premiums by reserving an additional rent in case the premiums are not duly paid, and if a breach of the covenant occurs, the lessor may either take proceedings to recover the additional rent or may proceed by ejectment or otherwise for the breach. (*Weston v. Managers*.) The covenant ought generally to make provision for the laying out of the insurance moneys in the reinstating of the premises (see *Lees v. Whitely*), and if it is the lessor who gives the covenant, the lessee ought to be required to enter into a counter covenant not to do anything to increase the rate of insurance.

As to what constitutes a breach of the covenant to insure, it has been held that if the premises are left uninsured for any part,

however small, of the term, even though no fire occur and proper insurances be afterwards effected, the covenant has nevertheless been broken. (*Penniall v. Harborne.*) And if the covenant provides that the insurance shall be effected in the joint names of the lessor and the lessee it will be broken by insuring in the name of the lessee alone (*Doe v. Gladwin*); but a similar covenant is well performed if the insurance be effected in the name of the lessor alone. (*Harens v. Middleton.*) And further, a covenant to insure in the name of the lessor alone is broken by insuring in the names of the lessor and the lessee jointly. (See *Penniall v. Harborne.*) The breach of this covenant is a continuing breach, so that the receipt of rent by the lessor after the omission to insure will only operate to waive the breach, so far as it has occurred prior to the receipt of the rent. (See *Doe v. Gladwin.*) As to the statutory enactments relating to relief for the forfeiture incurred by a breach of this covenant we shall speak later on. (See *post*, p. 302.)

Restrictive Covenants.

In order to protect himself, or to prevent the property from being depreciated in value, the lessor often requires the lessee to enter into covenants which restrict his right to use the property in any manner he thinks fit. Thus the lessee must sometimes covenant that he will reside on the demised premises. Such a covenant is good, and will be broken by the lessee doing any act which renders his residence there impossible. (See *Doe v. Hawke.*) So also he may bind himself to carry on a specific trade on the premises; but, it seems, that if he covenants not to carry on any other than a certain trade he is not bound to carry on the trade excepted. (See *Doe v. Grant.*) In framing a covenant of this nature you should be very careful as to the terms you use, for many of them have received a technical meaning, and they will be strictly construed. Thus there is a difference between a "trade" and a "business," the latter term being the more extensive of the two. Thus, to keep a school or a private lunatic asylum, or a "Home" for working girls, though not established for profit, is a "business," but does not come within the meaning of the word "trade." (See *Kemp v. Sober*, *Doe v. Bird*, *Bramwell v. Lang*, and *Rolls v. Miller.*)

The following brief digest of some of the decisions which have been established by the courts on the construction of covenants of this nature will perhaps be useful to you:—

To carry on the trade of a coach-maker is not a breach of a covenant not to carry on an "offensive trade" (*Bennet v. Sadler*), nor is such a covenant broken by using the premises to store lucifer matches, though this might be a breach of a covenant not to carry on a dangerous trade. The establishing of a national school is not a breach of a covenant "not to do anything which might be a nuisance" (*Harrison v. Good*), and a brewhouse is not necessarily a "nuisance." (*Gorton v. Smart*.) But a covenant not to use the premises for the sale of spirituous liquors will be broken by a grocer selling wines and spirits across the counter. (*Fielden v. Slater*.) Technical meanings have been attached to the terms "beer-house" and "beer-shop;" and a sale of beer not to be drunk on the premises is not a breach of a covenant not to use the premises as a "beer-house." (*London and North Western Rail. Co. v. Garrett*, and see *Pease v. Coates*, and also *Holt v. Collyer* and *Nicholl v. Fleming*.) But a "beer-shop" includes a place where beer is sold for consumption off the premises. (See *Bishop of St. Albans v. Battersby*; *London, &c. Co. v. Field*.) A covenant to use the premises as a private dwelling house only is broken by using it as an office to receive orders for coal (*Wilkinson v. Rodgers*), or as a ladies' school (*Wickenden v. Webster*), or as a charitable institution for the board and education of children. (*German v. Chapman*.) If the lessee covenants that the lessor, or some particular brewer, shall have the exclusive right to supply the premises with beer, this is a valid covenant (*Catt v. Tourle*); but there is understood the condition that good beer shall be supplied. (See *Thornton v. Sherratt*.)

We may here remark that the lessor may, under some circumstances, lose his right to enforce restrictive stipulations. Thus, he will so lose it by lying by, while a breach is being committed, in such a way as that it may be presumed that he has waived the breach, or by the acceptance of rent (*Doe v. Allen*), especially if he has knowledge of the breach for a long time, and has made no objection, and has received the rent. (See *Gibson v. Doeg*.) But the mere acquiescence in a trifling breach will not prevent him from exercising his right under the covenant to restrain more extensive ones. (*Richards v. Revitt*.)

The lessor sometimes enters into restrictive covenants: thus, he may covenant not to let the adjoining premises for the carrying on of some trade which the lessee intends to carry on upon the demised premises. But if, under such a covenant, he does not bind his assigns, any person to whom he may let the premises will not be bound by the covenant. (See *Kemp v. Bird*.)

Covenants not to assign or underlease.

Covenants of this description are not "usual" covenants. (See *Church v. Brown*.) Nor will they ever become "usual." (See *Henderson v. Hey*.) It seems doubtful if they run with the land, but they will bind the assigns if named. (*West v. Dobbs*.) The ordinary covenant does not, as a rule, prohibit assignment altogether, but generally stipulates that there shall be no assignment without the written consent or licence of the lessor. There have been many decisions on the point as to what will amount to a breach of a covenant of this kind: of course the question depends in a great measure on the wording of the particular covenant. Thus, it has been held that a condition not to assign without consent is not broken by a specific devise of the term (*Fox v. Swan*), and, in general, it will not be broken by any assignment which occurs by the act of law, and is involuntary. So that no breach occurs by the bankruptcy or liquidation of the lessee, though the effect thereof is to vest the term in the trustee (*Doe v. Beavan*), or by an execution if, at least, it is suffered without collusion or any intention to evade the covenant (*Doe v. Carter*), or by a compulsory sale to a company under the Lands Clauses Act. (*Bailey v. De Crespigny*.) Again, it will not be broken by a mere equitable mortgage by deposit. (*Doe v. Hogg*.) But a covenant may be worded so as to have a very wide effect, and if it be that the lessee shall not do or permit any act of alienation, it will be broken by any act, the legal effect of which is to result in alienation. (See *Ex parte Eyston*.) But a covenant not to assign is not broken by granting an underlease unless the covenant be "not to assign, or otherwise part with the premises for the whole or any part of the term" (*Doe v. Worsley*); and letting as lodgings is not a breach of a covenant not to underlease. (*Doe v. Laming*.) But where partners were assignees of a lease which contained a covenant not to assign without the lessor's consent in writing, and upon the dissolution of

the partnership one of the partners assigned all his interest to the other without such consent, this was held to be a breach. (*Varley v. Coppard*; and see *Finch v. Underwood*.) But if one of two joint lessees withdraws, leaving the other in sole possession of the premises, this would not be a breach. (*Corporation of Bristol v. Westcott*.)

A covenant not to "underlet" will apparently prevent an assignment of the term. (See *Greenaway v. Adams*.)

Sometimes the covenant is qualified by stipulating that the consent of the lessor, while necessary to the assignment, shall not be "arbitrarily withheld." These words are construed to mean that the consent shall not be unreasonably or unfairly withheld. The lessee cannot recover damages if the consent be arbitrarily withheld, but if it is so withheld, he is at liberty to assign without consent. (See *Treloar v. Bigge* and *Sear v. Household Association*.) And if the consent is not to be withheld to an assignment to a "respectable person," the lessee may assign to such a person, without the consent of the lessor, and it will be no breach of the covenant. (*Hyde v. Warden*.)

In order to give the tenant a right to damages for the withholding of the consent in a proper case, an express covenant to give the consent by the landlord should be inserted in the lease.

Finally, we may observe that no relief will be given against a forfeiture incurred by the breach of a covenant of this kind, even under the Conveyancing Act, 1881 (see *post*, p. 304).

(8) *Covenants by the Lessor.*

The Covenant for Quiet Enjoyment.—Such a covenant may be insisted on under an agreement for a lease with the "usual" covenants and provisoes.

This covenant, as usually worded, will only extend to the lawful and not the wrongful acts of strangers, but it will include a wrongful eviction by the lessor himself. (*Dudley v. Folliet*.)

But if the lessor covenants against the acts of certain specified persons, a breach of the covenant will occur by a disturbance by such persons, whether rightful or wrongful. (*Nash v. Palmer*.) A covenant against disturbance by the lessor and all persons "claiming or pretending to claim" a right in the demised premises will have the same effect. (*Chaplin v. Southgate*.) But in

determining what amounts to a breach of this covenant, the wording of it must in all cases be taken into consideration ; for the liability of the lessor will depend on the extent to which he has bound himself. Thus, as we have already mentioned, he may by an express covenant render himself subject to a less amount of liability than he would be subject to under the implied covenant for quiet enjoyment, or he may make his liability less. Thus, if he covenants as against the acts of himself, and of "all persons claiming by, through or under him," his covenant will not extend to an eviction by a person claiming by a title paramount to him (*Merril v. Frame*) ; nor will it include a person who claims against him, as in the case where a distress is made on the premises at the instance of a person claiming land-tax due from him before the demise. (*Stanley v. Hayes.*) But a person who claims under a settlement made by the lessor himself is a person "claiming under" him. (See *Carpenter v. Parker.*) The covenant is not broken by the mere trespass by a stranger ; nor does such a trespass operate as a just cause for the tenant to suspend his rent. (See *Paradine v. James.*) Nor is the injury caused by the bursting of a water-pipe reasonably placed and properly maintained on the premises by the lessor a breach of the covenant. (*Anderson v. Oppenheimer.*) Any proceeding in a court of law which has the effect of interfering with the title and possession of the land is a breach of the covenant. But where the land was primarily subject to a condition against the carrying on of certain trades, and the lessee took his lease without notice thereof, and afterwards an injunction was obtained restraining him from carrying on one of the prohibited trades, it was held that the injunction did not amount to a breach of the lessor's covenant for quiet enjoyment ; for it was said the covenant was meant to secure to the tenant the title and quiet possession of the land, but not to warrant that he might use the property for any purpose not specially provided against by restrictive covenants. (*Dennett v. Atherton.*) Again, the covenant will be broken if the lessor does anything in the assertion of a right hostile to the full enjoyment of the land by the covenantee. Thus if the lease be of a water-course and the lessor afterwards stop the water-course up (see *Pomfret v. Ricroft*), or of a house and the lessor so build as to darken the lessee's windows (*Potts v. Smith*), or of a seam of coal and the lessor afterwards so works the strata above as to cause the

roof of the mine to fall in (*Shaw v. Stenton*), these will all be breaches of the covenant. Lastly, we may observe that the breach of this covenant will not discharge the tenant from any liability under the lease except the liability to pay rent (*Morrison v. Chadwick*), for the lessee has his action against the lessor for the eviction, and may thus obtain satisfaction for any loss or inconvenience which he may have suffered.

(9) *Conditions for Re-entry and Forfeiture.*

In addition to the covenants by the lessee, the lessor generally takes care to protect himself and ensure that the covenants shall be carried out, by inserting in the lease a condition that upon any breach of a covenant he shall have power to re-enter on the premises, or that the breaches shall cause a forfeiture of the lease. Such cases must be distinguished from the cases where the lease is granted upon a condition, for here, if the condition be broken, the lessor may enter without an express proviso on the point, but, for a mere breach of the covenant, he can only enter if there be a stipulation to that effect in the lease. (See *Doe v. Phillips*.) Thus, if in the lease it is "stipulated and conditioned" that the lessee shall not assign, this is a condition, and no express power is needed to give the landlord the power to re-enter; but if the tenant merely agrees that he will not assign, this is not a condition, so that the lessor cannot re-enter in the absence of a proviso for re-entry. (See *Crawley v. Price*.)

A proviso for re-entry on the breach of any of the covenants of the lease cannot be insisted on under a simple agreement for a lease. (*Hodgkinson v. Crouce*.) If, however, there has been an agreement for a lease to contain the usual covenants and conditions, the lessor can insist on a condition of re-entry for non-payment of rent, but not for breach of any other covenant. (*Hampshire v. Wickens*.) These provisos for re-entry will be somewhat strictly construed, but still in accordance with the intentions of the parties. Thus, a proviso which, as worded, seems to be meant to apply to affirmative covenants only, will not be applied to the breach of negative covenants (see *Hyde v. Warden*) unless proper words are made use of in the proviso. As negative covenants cannot be "performed," a proviso for re-entry on making default

in the performance of any of the covenants will not authorize a re-entry for breach of such covenants (*Doe v. Marchetti*); but in the case of *Croft v. Lumley*, where the proviso was for re-entry "if the lessee made default of or in the performance of all or any of the covenants which on his part ought to be observed, performed or kept," it was held that these words would embrace negative as well as positive covenants. And *Evans v. Davis* seems to show that the word "perform" applies to a positive, and the word "observe" to a negative, covenant. (See also *Waddiham v. Postmaster-General*.)

As a rule, the lessor may take advantage of the proviso for forfeiture immediately upon the breach, without any preceding formalities; but, in the case of forfeiture for the breach of the covenant to pay rent, he is obliged by the common law to make a previous demand of the precise amount of rent due on the precise day on which it is payable, at a convenient time before sunset, upon the land, at the most notorious place of it, or at the place, if any, appointed for payment. (*Duppa v. Mayo*.) To avoid these troublesome formalities, the proviso generally stipulates that, "although no legal demand shall have been made for the payment of the rent," the lessor may re-enter. By statute law (11 Geo. 2, c. 19, and 15 & 16 Vict. c. 76) the landlord may re-enter, even though these words do not appear in the proviso, and even though he makes no formal demand, but only in the event of the rent being in arrears for six months, and there being no sufficient distress on the premises.

Although there is a right of re-entry to secure the performance of a covenant, a mere breach thereof does not determine the lease; but it becomes voidable at the option of the lessor, but not of the lessee, as he would otherwise be able to take advantage of his own wrong. (*Rede v. Farr*.) And the lessor must do some clear act showing his intention of avoiding the lease, *e.g.* by commencing proceedings in ejectment (*Jones v. Carter*), or some other such act, and when he has once elected to avoid the lease he cannot draw back. When the lessor enters for forfeiture, the rights of an under-lessee in the lands are gone. (*G. W. Rail. Co. v. Smith*.)

Before taking advantage of a proviso for re-entry or forfeiture, the lessor must now take into consideration the provisions of sect. 14 of the Conveyancing Act, 1881, which (except as regards

covenants not to assign or underlet, a condition for forfeiture on the lessee becoming bankrupt, or having his interest taken in execution, or a covenant in a mining lease to allow the lessor to inspect the mine or his books) enacts that the right of re-entry shall not be enforceable, and the forfeiture shall not accrue unless—(i) the lessor has served on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy requiring in that notice that the lessee shall remedy it, and in all cases (*i. e.* whether the breach is or is not remediable) requiring him to make a monetary compensation for the breach; and (ii) the lessee for a reasonable time after the receipt of such notice has failed to remedy the breach where it is remediable, or to make reasonable compensation in money to the lessor's satisfaction.

By the same act further provision is made for the relief of the tenant against the harsh exercise of these provisos for re-entry and forfeiture by the lessor. Formerly, equity would grant relief against a forfeiture incurred by a breach of the covenant to pay rent (*Wadham v. Calcraft*) on the terms of the lessee paying the rent, interest and costs, provided he applied for relief within six months after he had been ejected. (Com. Law Proc. Act, 1852, ss. 210, 211.) Common law courts were empowered to grant relief under similar circumstances by 23 & 24 Vict. c. 126, s. 1. By 22 & 23 Vict. c. 35, s. 14, and 23 & 24 Vict. c. 126, s. 2, courts of equity and law were empowered to give relief against forfeiture for breach of a *covenant to insure* upon certain terms, *i. e.* where no fire had happened; where the breach had occurred through accident, and a proper assurance was on foot at the time of the application to the court; but relief would only be given once. But the provisions of these acts only applied to the breach of this particular covenant. Now, sect. 14 of the Conveyancing Act extends to *all* covenants and conditions in any lease (which includes an underlease and a grant at a fee farm rent), except in the three cases mentioned above. The court can give the relief even if the breach has occurred before the commencement of the act. (*Quilter v. Mapleson*.) Relief will be given in all cases in which it can be granted on terms which will afford the landlord full protection. (*Ebbets v. Booth*.)

But not only does the act prevent a landlord from making a harsh use of his power to re-enter and his right to take advantage

of a forfeiture, but when the lessor has, by complying with the previous provisions of the act, entitled himself to enforce these rights, and is actually proceeding so to do, the lessee may apply to the court for relief, even at the last hour, and the court may grant or refuse relief, and on such terms as it may think fit. For the purposes of the section a lease includes (*inter alia*) an underlease; lessee includes underlessee, and a lessee's heirs, executors, administrators, or assigns; lessor also includes an underlessor, his heirs, executors, administrators, or assigns; and even though the right of re-entry or forfeiture accrues under some stipulation inserted in pursuance of some act of parliament, notice of the breach, &c. must be given as required by this section. The section expressly enacts that nothing is to affect the law of re-entry or relief in case of nonpayment of rent. This law was, and still is, that equity, and by statute the common law courts, will relieve against the forfeiture for nonpayment of the rent on the lessee paying what is due, with interest and costs; so that the forfeiture accrues at once, and no notice to the lessee, under this act, is required, but the lessee may obtain relief on paying the rent, interest and costs within the limited time.

By sect. 10 of the act, the benefit of the lessee's covenant, and the rent reserved by a lease, and the condition of re-entry or other conditions, is incident to the reversion, even if severed, and may be taken advantage of by any of the persons entitled to the land subject to the term. The effect of this is to give the beneficial owner of the rent or income the right to sue as well as the legal reversioner.

By sect. 11 of the act, the obligation of a covenant entered into by the lessor is made incident to the reversion, and, notwithstanding the severance of the reversion, the person entitled to the benefit of the covenant may sue on it. But this only applies to covenants by which the lessor has power to bind the reversionary estate.

CHAPTER III.

SOME ADDITIONAL POINTS IN CONNECTION WITH LEASES.

I. The effect of Waiving a Right to Re-enter.

WE must now say a few words as to the effect of the waiver of the right to re-enter or of the forfeiture caused by a breach of covenant. The old law, as established by *Dumpor's case*, was, that every condition was one and entire and incapable of being divided, so that if a condition was once waived it was gone for ever. This, however, only extended to express waivers; for a waiver implied from the receipt of rent after and with knowledge of a breach, did not operate to debar the lessor from taking advantage of the condition on a subsequent breach. The rule was the same with regard to licences granted by the lessor to commit a breach of a covenant secured by a right of re-entry or a clause of forfeiture. But by 22 & 23 Vict. c. 35, it was provided that in such cases the licence granted should extend to the permission actually given, or to the specific breach of covenant authorized to be committed, and not operate to prevent proceedings for a subsequent unlicensed breach, and a provision was also made that where a licence was given to one of several lessees to commit a breach of such a covenant, or to one lessee in respect to part only of the property, the licence was not to operate to destroy the right of re-entry in case of a breach by the co-lessees, or by the lessee of the rest of the property. And by 23 & 24 Vict. c. 38, it was enacted that where an actual waiver of the benefit of any covenant or condition had been made by the lessor, it was not to extend to any instance other than that to which it specially related, or to be deemed a general waiver of the benefit of such covenant or condition, unless an intention to that effect appeared.

II. The Surrender of Leases.

Leases may be determined in several ways, and, *inter alia*, by surrender, which may be express, in which case it must be by deed,

unless it is of a copyhold interest, or of an interest which might have been created without writing, *e. g.* if a lease for not more than three years at two-thirds of a rack rent; for of such a lease, while the Statute of Frauds requires the surrender to be in writing, 8 & 9 Vict. c. 106 does not require it to be by deed (8 & 9 Vict. c. 106); or the surrender may take place impliedly by the operation of law. This occurs when the one party does, and the other assents to, an act inconsistent with the continuance of the lease. Mere cancellation of the lease does not operate as a surrender. (*Roe v. Archbishop of York.*) But if the lessor, with the assent of the lessee, during the continuance of the term, grant a new lease either to the tenant himself or to him jointly with a third person, or to a third person alone, in all these cases the result is that the old lease is deemed to be surrendered. (See *Lyon v. Reed*; *Hammerton v. Stead* and *Davison v. Grant.*) The surrender will occur even if the old lease was by deed and the new one is by parol only. (*Dodd v. Acklom.*) But the giving up of a small portion of the premises in consideration of a proportionate reduction of the rent, does not of itself amount to a surrender by the operation of law. (*Holme v. Brunskill.*)

There are also other acts which will amount to a surrender by the operation of law. Thus, anything which amounts to abandonment of possession by the tenant, if there is evidence to show that the landlord assented thereto, will constitute such a surrender, *e. g.* where the tenant left the premises and wrote to the landlord that he might relet the premises, and the landlord immediately did so, it was held that there was here a surrender by the operation of law. (*Nicholls v. Atherstone*; and see *Walls v. Atcheson*, where no request was made by the tenant to relet.) Again, delivery to and acceptance of the key of the premises, either on a parol agreement that the tenancy shall cease, or under circumstances from which the intention of the lessor to resume possession can be inferred, will have a similar effect. (See *Moss v. James.*) But in all cases there must be something to show the assent of the landlord to the quitting of possession. If the key be merely left with the landlord, the landlord is not bound to return it, and if he does not do so it will not be presumed therefrom that he has assented to the quitting of possession. (*Cannan v. Hartley*; and see *Bessel v. Landsberg.*) Nor will a mere attempt by the landlord to relet the

premises estop the landlord from alleging that the tenancy is still subsisting, and when there is a reletting the surrender only takes effect as from the date thereof. (*Oastler v. Henderson.*) A surrender will not be allowed to act prejudicially on the rights of third parties, so that it will not avoid or prejudice an underlease. (See *G. W. Rail. Co. v. Smith.*)

Another method of determining a tenancy is by notice to quit.

III. Notices to Quit.

Notice to quit applies most especially to tenancies from year to year, and attaches to them without any special stipulation; and, indeed, any stipulation to deprive either party of the right to determine the tenancy by such a notice is void as being repugnant to the nature of a tenancy from year to year. (*Wood v. Beard.*) But the parties may contract for any length of notice, or that the tenant may quit without notice, or that the notice may expire at any period of the year, and generally may vary the requisites of the notice as required by the law. If no stipulations are made the notice, which may be a verbal one, must be a half-year's notice given half-a-year at least before the expiration of some year of the tenancy. But if the tenancy commenced on some one of the usual quarter days, the notice must be given before the last quarter day but one before the quarter day on which the current year of the tenancy expires, and this will be a good notice, though it be less than the full period of 182 days or half-year required by law. (See *Roe v. Dorrant.*) In case of a weekly tenancy a week's notice, or at least a reasonable notice (*Jones v. Mills*), and in the case of a monthly tenancy, a month's notice, is required. Special provisions are made by the Agricultural Holdings Act, 1883, as to notice to quit: these we shall mention presently.

The notice must expire at that period of the year when the tenancy commenced. If there be a doubt as to when the tenancy commenced it is a question for a jury to settle. (*Doe v. Howard.*) If the tenant enter in the middle of a quarter and pay rent for the half-quarter, and then goes on paying rent from quarter to quarter, or if he gets the half-quarter rent free, the tenancy will, for the purposes of giving notice to quit, be deemed to have commenced on

the quarter day next after he entered. (*Doe v. Stapleton.*) The notice must be given to quit the whole of the premises; a notice to quit part is void, unless it is given under the Agricultural Holdings Act, 1883. (See *post*, p. 313.) If the day on which it is intended to quit is specifically mentioned, care should be taken that it is the right day, for if it is not the notice will be invalid. (*Doe v. Lea.*) But a notice for two alternative days is good if either of them be the right one. (*Doe v. Rightman.*) But the best form of notice is one which does not specify the day by name but states the intention of quitting "at the expiration of the current year of the tenancy which shall expire at the end next after the end of one half-year from the date hereof." The notice must be imperative, and no conditions must be imported into it; also a notice to quit or pay double rent is bad; but it has been held that a notice which ran "I desire you to quit or I shall insist on double rent" was good, as it did not offer an alternative. (*Doe v. Jackson.*) And unless the tenant quitted on such a notice the law would imply an agreement on his part to pay the double rent. Notice should be given to the lessor or his agent for receiving rent and letting the property; but a notice to a person authorized to collect the rent merely would not be good. (See *Doe v. Walters.*) It may, *inter alia*, be served through the post; and in one case where this was done, and the letter reached the address during business hours on the last day for giving notice, but the landlord had left and did not receive it till next day, the notice was held to be in time. (*Pappillon v. Brunton.*) The notice may be withdrawn by consent, or it may be waived expressly or impliedly, as by the landlord distraining for rent or receiving rent after the expiration of the notice. But it would not seem to be a waiver merely to demand the subsequent rent without receiving it. (*Blyth v. Dennett.*) And a mere indulgence to the tenant, as allowing the tenant for convenience sake to remain on the premises after the expiration of the tenancy, will not amount to a waiver. (See *Doe v. Crick.*)

IV. Rights of the Parties on the Expiration of the Term.

Some few words must be said as to the rights of the parties after the expiration of the term. Thus, in particular, the right of the

tenant to remove certain fixtures, his right to emblements, and the landlord's rights if the tenant improperly holds over, demand your attention.

(1) *The Removal of Fixtures.*

To discuss this subject fully would be impossible within our limits, and for details you must refer to some standard work on the law of landlord and tenant. You must bear in mind, however, that tenants are not entitled to remove all the fixtures they have set up during their tenancy; and, indeed, the rule is, that if a tenant affixes any chattel to the soil, it becomes the property of the landlord on the termination of the tenancy. But there are certain fixtures known as "tenants' fixtures," which by virtue of custom or by the common or statute law he is entitled to remove. These fixtures generally fall under the three heads of trade fixtures, fixtures set up for ornament, convenience or domestic use, and agricultural fixtures. Under the first head we may notice that, though a nurseryman may remove trees planted by him for the purposes of his trade (*Lee v. Risdon*), a private person may not remove trees, or even flowers, planted by him. (See *Wyndham v. Way*.) The following have been held to be removable trade fixtures:—Vats set up by a soap-boiler (*Poole's Case*); a fire engine set up by a colliery proprietor (*Lawton v. Lawton*); salt pans set up by the owner of salt works (*Lawton v. Salmon*); an engine screwed to planks used for trade purposes (*Climie v. Wood*); hot-houses erected by a nurseryman. (*Penton v. Robart*.) Under the second head we have to note that tenants' fixtures of this description can only be removed when the removal can be effected without damage not only to the premises, but to the chattel itself, and they will not be removable if they constitute not merely ornaments, but become virtually an essential part of the building itself. Thus, pannels, though easily removable without creating injury, were held not to be removable fixtures on this ground. (See *D'Eyncourt v. Gregory*.) The following are a few of the fixtures which have been held to be removable under this head:—Bells (*Lyde v. Russel*), cornices (*Avery v. Cheslyn*), bookcases nailed or screwed to the wall (*Birch v. Dawson*), ornamental chimney-pieces (*Leach v. Thomas*), a pump slightly affixed to the freehold (*Grymes v. Boweren*), marble slabs (*Allen v. Allen*), grates, ranges or stoves

fixed with brickwork in the chimney places, but removable without injury. (*R. v. St. Dunstan.*) As to agricultural fixtures we shall speak later on when considering the Agricultural Holdings Act of 1883. But we may state here that it was held in the leading case of *Elwes v. Mawc*, that the rule as to the removability of trade fixtures did not extend so as to allow fixtures set up for agricultural purposes to be removed.

The removal must only be effected during the continuance of the tenancy, or at least before the tenant quits possession, and the landlord has re-entered. (*Pugh v. Arton.*)

(2) *Emblements.*

When the term is liable to come to a sudden determination, and one which cannot be foreseen by the tenant, as where he is a lessee at will, or to a tenant for life, or his tenancy is otherwise liable to be put to a sudden end by the landlord, the tenant has a right to emblements. This is, however, a right which he will not have if the term be put an end to by his own act. Emblements consist of all crops produced by what has been termed "annual manual" labour; that is, they must not consist of such crops as are produced spontaneously, or which require more than a year to arrive at maturity. Thus, corn, turnips, carrots, potatoes, and the like, are emblements; and so are hops, though they spring from old roots, for they are annually manured. But clover is apparently not an emblement, for it takes more than a year to reach maturity. The tenant, then, has the right, should his term come suddenly to an end by some other cause than his own act while these crops are planted, and before they have yet come to maturity, to enter on the land in spite of the determination of the tenancy, and to reap and carry away the harvest of what he has sown. By 14 & 15 Vict. c. 25, s. 1, it is enacted, with regard to under tenancies, if they are held at a rack rent, that the under tenant, on his landlord's interest in the property suddenly determining, instead of his claim to emblements, shall continue to hold on till the expiration of the then current year of his tenancy, and shall then quit on the terms of his lease in the same manner as if it were then determined by effluxion of time or other lawful means during the continuance of the landlord's estate, and the succeeding landlord or owner may recover a fair proportion of rent for the period which may have elapsed from

the death or cesser of the estate of the preceding lessor to the time the tenant so quits, and the tenant and the succeeding landlord, as between themselves, and as against each other, shall have all the benefits and be subject to all the terms and conditions to which the preceding landlord and tenant respectively would have been so entitled or subject to in case the lease had determined in such manner; and no notice to quit will be necessary or required to determine the tenancy.

(3) *Some Special Provisions relating to Agricultural and Pastoral Holdings and Holdings cultivated as Market Gardens.*

With regard to agricultural holdings, the ordinary law as to fixtures and notice to quit is in some measure put on a different footing by the Agricultural Holdings Act, 1883, and this act also makes some important provisions as to compensation for improvements made by the tenant of such holdings. The act repeals the previous Act of 1875 and the amending Act of 1876; but in the main repeats its provisions in an amended form.

The act does not apply to holdings not agricultural or pastoral in whole, or in part agricultural and as to the residue pastoral, or in whole cultivated as a market garden, nor does it apply to any holding let to the tenant during his continuance in any office, appointment or employment held under the landlord. There is no necessity, as there was under the Act of 1875, that the holding be of two acres at least. The first part of the act relates to compensation for improvements made by the tenant. The improvements for which compensation is allowed are of three kinds:—(1) Improvements of a permanent nature, such as erecting buildings or laying down permanent pasture; for these the tenant only obtains compensation if they are effected with the landlord's written consent. (2) Improvements effected by drainage. For these compensation is only allowed provided due notice was given to the landlord, and he did not, as he may under the act, execute the improvements mentioned in the notice. If the landlord chooses to incur the outlay himself, provisions are contained in the act whereby the tenant pays interest on the money expended. (3) Improvements of a less important character, such as chalking of land, clay burning, consumption in the holding by cattle of cake, &c. For these improvements, unless some reasonable compensation is substituted, the

tenant is entitled to compensation, although effected without any notification to or consent of the landlord. Provisions are also made as to the manner in which the amount of compensation is to be estimated. The same part of the act also deals with the subject of notice to quit; sect. 33 providing that where half a year's notice expiring with the year of tenancy is by law necessary and sufficient for the determination of a tenancy from year to year, a year's notice shall be necessary and sufficient to determine an agricultural or pastoral tenancy, unless the parties agree in writing that the section shall not apply, when the ordinary half-year's notice will be necessary and sufficient. This section will apparently not apply to a yearly tenancy expressly determinable by a "*six months*" notice as distinguished from a "*half year's*" notice. (See *Wilkinson v. Calvert*.) And by sect. 41 the landlord may give his tenant notice to quit part of the lands demised, if he requires that part for any of the purposes set out in the act. The tenant can then, if he likes, within twenty-eight days of the service of the notice on him, give the landlord a counter notice that he accepts the notice for the whole of the premises, and the notice will take effect accordingly. Failing this counter notice by the tenant he must give up the portion referred to, whereupon he can claim the compensation as to improvements in that portion under the act, and his rent will be reduced in proportion to the amount of land given up. Provision is also made as to agricultural fixtures, in the main almost identical with those contained in the Act of 1875. A tenant may remove any engine, machinery, fencing or other fixture or building erected by him for which no compensation is given by the act; but before removal he must give the landlord a month's notice of his intention to remove, and the landlord may prevent the removal by purchasing the engine, &c. at a sum agreed upon by the parties or fixed by valuation. Damage done in removing must be made good by the tenant, and he cannot remove unless he has paid all rent and satisfied all obligations. There is no restriction, as there was in the Act of 1875, as to the removal of steam engines. The removal must be made during the continuance of the tenancy, or within a reasonable time after the determination thereof.

The second part of the statute deals with the law of distress, and puts some very desirable limits on it. By sect. 44, the landlord can only distrain for one year's arrears of rent instead of, as hitherto,

for six years' arrears. Where the rent is not by the ordinary course of dealing payable until a quarter or half-year after legally due, it is not deemed for the purposes of distress under the act due until actually payable. And by sect. 45, a landlord cannot distrain cattle belonging to a third person, and being agisted by the tenant, when there is other sufficient distress, and even where there is no other sufficient distress he can only distrain such cattle for a sum not exceeding the amount due to the tenant for the feeding. And further, agricultural and other machinery belonging to a third person and on the demised premises *bonâ fide* for hire or use, or on the demised premises for the purposes of the tenant's business, and live stock *bonâ fide* belonging to a third person, and on the land for breeding purposes, are absolutely privileged from distress. Again, by sect. 47, any compensation due to the tenant under the act, or by custom or contract, may be set off against the sum distrained for; and by sect. 49 provision is made for keeping down the expenses of distresses for 20*l.* or upwards. In the management of the distress, too, the Act provides (sect. 50), that the goods seized need not, as required by 2 Will. & M. c. 5, s. 1, be appraised before sale, but the tenant has the right to demand in writing that the sale shall take place by public auction; and by sect. 51, the period of five days fixed by the above statute to elapse before the sale of any goods seized under a distress, so as to enable the tenant to replevy, may be extended to fifteen if the tenant makes a request to that effect in writing, giving security for any additional costs which may be incurred. And by sect. 52, certified bailiffs are to be employed, authorized by writing under the hand of a county court judge. (See *Saunders v. Saunders*.) Some miscellaneous provisions are made by Part 3 of the act. By sect. 55, agreements as to compensation for improvements inconsistent with the act are void, but the provisions of the act on the subject may be excluded if reasonable compensation be afforded to the tenant by the lease itself. By sect. 56, if an incoming tenant, with the landlord's consent, pays an outgoing tenant for compensation payable under the act he will be entitled to such compensation when he quits as the former tenant, had he remained such, would have been entitled to. By sect. 59, with some few exceptions, no compensation under the act is allowed for improvements made by the tenant within a year previous to his quitting.

V. The Provisions of the Ground Game Act, 1880.

In connection with leases of land, as distinguished from leases of house property, it will be useful for you to be well acquainted with the provisions of the Ground Game Act, 1880, as your advice may be consulted on points arising under that statute. This act, which came into force in September, 1880, and which expires of its own accord in 1887, provides that the occupier of land shall have, as incident to and inseparable from his occupation, the right to kill and sell ground game—that is, hares and rabbits thereon, concurrently with any other person who may be entitled to kill and take such game : every agreement, condition or arrangement which purports to divest or alienate this right, or gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void. But the right is subject to the following limitations :—

- (1) The occupier shall kill and take ground game only by himself or by persons duly authorized by him in writing ; and he and one other person authorized in writing by him shall be the only persons entitled to kill ground game with firearms ; and no person shall be authorized by him except members of his household resident on the land, persons in his ordinary service on such land, and any one other person *bonâ fide* employed by him for reward in the taking and destruction of ground game ; and every person so authorized on demand by any person having a concurrent right to kill the ground game, or any person authorized by him in writing to make such demand, shall produce to the person so demanding the document by which he is authorized, and in default he shall not be deemed to be an authorized person.
- (2) A person shall not be deemed to be an occupier of land by reason of his having a right of common over such lands ; or by reason of an occupation for the purpose of grazing or pasturage of sheep, cattle or horses, for not more than nine months.
- (3) In the case of moorlands and uninclosed lands (not being arable lands), the occupier and the persons authorized by

him shall exercise the rights conferred only from the eleventh day of December in one year until the thirty-first day of March in the next year, both inclusive ; but this provision shall not apply to detached portions of moorlands or uninclosed lands adjoining arable lands, where such detached portions of moorlands or uninclosed lands are less than twenty-five acres in extent.

This act does not apply to cases in which, *at passing*, the right of taking game is for valuable consideration vested in some person other than the occupier. Thus, it does not apply to a lease which takes effect after, but which is made in pursuance of an agreement made before, the act came into operation. (*Allhausen v. Brooking*.) No person shall under a penalty use any fire-arms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise ; nor shall he employ spring traps, except in rabbit holes, nor employ poison.

VI. The Liabilities incurred by a Tenant who holds over.

The last point on the law relating to leaseholds which we shall mention will be the law as to the liability of a tenant who holds over after the expiration of his term. There is an implied undertaking on a demise of land that the tenant will deliver up possession at the expiration of his tenancy (*Henderson v. Squire*), and the landlord may assert his right to possession by entry, and may expel the tenant. This he may do by peaceably taking possession, and if the premises are vacant he may break open a door to obtain possession. (*Turner v. Meymott*.) But if the tenant is still in possession he should not attempt to use force till he has first requested him to go, and even then he must only use so much force as is sufficient to overcome his resistance. But the safest course is to take legal proceedings in ejectment. By 4 Geo. 2, c. 28, it is provided that if a tenant for years wilfully holds over after the expiration of the term, and after demand made and notice in writing given for delivering the possession thereof by the lessor, he will, so long as he keeps the lessor out of possession, be liable to pay rent at the rate of double the yearly value of the land. This act does

not apply to tenants who are not at least tenants from year to year, and therefore has no application to weekly tenancies (see *Lloyd v. Rosbee*), and further, it only applies when the holding over is strictly wilful and contumacious. (*Wright v. Smith*.) The demand and notice in writing is sufficiently made in the case of a tenancy from year to year by the ordinary written notice to quit without any further demand. (*Hirst v. Horn*.) The double value when it has become payable is not, strictly speaking, rent; so it cannot be distrained for (*Timmins v. Rowlinson*), and as it is a penalty an action to recover it must be brought within two years under 3 & 4 Will. 4, c. 42.

By 11 Geo. 4, c. 19, s. 18, it is enacted that if a tenant gives notice to quit and then holds over he will thenceforward have to pay *double the rent* he would otherwise have to have paid. In this case the double rent can be recovered by distress, and the notice to quit need not have been in writing.

PART IV.—SETTLEMENTS.

CHAPTER I.

THE OBJECT OF A MARRIAGE SETTLEMENT.

THERE seems to be a wide-spread impression that since the Married Women's Property Act, 1882, a marriage settlement is to a great extent, if not altogether, unnecessary, and that the act itself, more or less, answers the purpose for which a settlement was formerly made. That this impression is erroneous will be at once gathered from a perusal of the act, though it is true to the extent that the position of a woman who marries after December, 1882, without any settlement being made upon the marriage, is now much more nearly akin to that of a woman who married with a settlement than it was before the passing of the act. But you should note that settlements will still be of the greatest importance in the majority of cases; for, though the act supplies the place of a settlement to some extent, yet many things are done by a settlement which are left entirely untouched by the act. Thus, the act removes the husband's marital rights, but it does not remove the marital control; and if it is wished that a woman shall hold her property so that her husband cannot induce her by "his kicks or his kisses" to dispose of it in his favour, it must still be settled on her with restraint upon anticipation. So, too, the act makes no provision for the husband, who, under the usual form of settlement, generally gets a life interest in his wife's property after her death, and so to protect the husband a settlement is still necessary. Again, settlements make provision for the children, which is not done by the act. And trustees are interposed by a settlement—there are none given by the act. The result is, that settlements will still be in general use, and when they are used they may abridge, control or enlarge the statutory rights of the woman.

In order properly to understand the objects which a settlement is intended to effect, so far as the protection of the wife's property against the husband is concerned, it will be advisable in the first place to consider the position of a married woman under the Acts of 1870 and of 1882 ; for though the former act is repealed by the latter, it will still regulate rights, &c. acquired before the 1st of January, 1883. By the Act of 1870, certain property, which formerly both at law and in equity passed to the husband, was given to the wife for her separate use, just as if it had been settled upon her, viz.—(1) All property earned by the exercise of her hands or brains after the 9th August, 1870, no matter when married, and the investments, &c. of such earnings ; (2) if married after the 9th of August, 1870, the rents of all real property and the absolute interest in all personal property coming to her under an intestacy ; (3) if married after the 9th of August, 1870, sums of money given to her by deed or will not exceeding 200*l*. These provisions were of a tentative character only, and scarcely affected the rights of husbands married before the act came into operation, and only partially the rights of those married after that date ; for if real property, or any sum exceeding 200*l*., was given by deed or will to a woman married after the 9th August, 1870, and was not stated to be for her separate use, the property vested in the husband just as before the act, subject to the wife's equity to a settlement, if the husband could not get possession of it without the aid of the Court of Chancery. But now, by the Married Women's Property Act, 1882, the old common-law notion that man and wife are one person may be considered to be exploded, and a married woman is enfranchised and placed for nearly all purposes in the position of a *feme sole*, at least with regard to property rights. Under this statute, every woman married since the 31st December, 1882, is entitled to hold as her separate property, and to dispose of by will or otherwise, all separate property, whether real or personal, belonging to her at the time of the marriage, or acquired by, or devolving on, her afterwards ; and every woman who was married before the 1st January, 1883, is entitled to hold as her separate property, and to dispose of by will or otherwise, all her separate property, whether real or personal, her title to which, whether vested or contingent, and whether in possession, remainder or reversion, accrues after that date. The act was held to apply where her title in reversion

accrued before January 1st, 1883, but did not fall into possession till after that date. (*Baynton v. Collins*; *Re Hughes*, and *Re Thompson*.) And, further, a married woman, whatever may be the date of her marriage, is, by the combined effect of the two acts, entitled for her separate use to any wages or earnings acquired or gained by her since the 8th of August, 1870, in any employment, trade or occupation in which she is engaged, or which she carries on separately from her husband, and any money or property acquired by her by the exercise of any literary, artistic or scientific skill, and all investments of such wages, earnings, money or property. Again, by the Act of 1882, a married woman may hold stock and shares in companies, annuities, public stock and funds, deposits in savings banks, shares in friendly, benefit, &c. societies, and the dividends are, in such case, to be paid to her on her own receipt. These stocks and shares, &c. can be transferred by the woman alone, and any liability attaching to them the separate estate of the woman alone is liable to make good. But nothing in the act requires or authorizes any corporation or joint stock company to admit any married woman to hold shares to which any liability may be incident, contrary to the provision of any act of parliament, charter, bye-law, articles of association or deed of settlement regulating such company. This provision is somewhat similar to the provision contained in the Act of 1870, but it is much wider in extent; for, under the earlier act, she was only allowed to hold shares, &c. to which no liability was attached. The act further makes provision for enabling a married woman to hold such securities jointly with a person or persons other than her husband, and for the transferring the same with that other or others without the concurrence of the husband. The act also provides that a married woman may effect a policy on her own life or the life of her husband for her separate use, and a policy effected by a man on his life, and expressed to be for the benefit of his wife and children, or for his wife or his children, or by a married woman on her life, and expressed to be for the benefit of her husband and children, or for the children, will create a trust in favour of the objects named, and the moneys payable under the policy are not to be liable to the debts of the assured. But creditors, if they can prove that the policy was effected and the premiums paid with intent to defraud them, are entitled to be paid

a sum equal to the premiums so paid. A trustee to receive the policy moneys may be appointed (and the appointment of a new trustee is also provided for), and if no trustee be appointed, the policy vests in the assured or his personal representatives, in trust for the above purposes. The receipt of the trustee, or of the legal personal representative, where no trustee, or no notice of the appointment of a trustee is given to the assurance company, is a discharge to the company for the money secured by the policy, or for the value thereof, in whole or in part. Provision is made that questions between husband and wife as to the title to, or the possession of, property in any bank, corporation, &c., in whose books any stocks, &c. of either party are standing, may be settled by a judge of the High Court on summons, or by a county court judge, without regard to the value of the property in dispute. The order, when made, can be appealed against, and when proceedings are commenced in the county court, which, owing to the amount involved, could not, but for this act or the Act of 1870, be heard in the county court, the respondent or defendant may have the same transferred to the High Court by a writ of *certiorari*. Moreover, a judge may hear any application under the act, if either party so require, in his private room.

While the act thus confers extensive rights on married women, it also takes care to impose on her corresponding liabilities, and, also, to provide for the protection of her husband and her creditors. Thus, her contracts will, in future, bind her separate estate, whether that estate is owned by her at the time of the contract or is acquired subsequently, unless a contrary intention be shown. And she is made liable to be sued both in contract and in tort as if she were a *feme sole*, without the necessity of joining her husband as co-defendant, and damages or costs recovered against her will be payable out of her separate property.

Besides being available to her creditors by means of an action, in future the separate estate of a married woman, who carries on business apart from her husband, will be available to them under bankruptcy proceedings; this was not formerly the case; for even where under the Act of 1870, she carried on a business for her own benefit it was held she could not be made bankrupt, even though she had separate property. (*Ex parte Jones, Re Grissell*.) And though it is expressly provided that the provisions of the act are

not to affect any settlement, whether ante-nuptial or post-nuptial, respecting the property of any married woman, nor even are they to interfere with any restriction against anticipation, whenever or however imposed, in order to prevent fraud, it is enacted that no restriction against anticipation imposed by a woman in a settlement made by her of her own property is to be valid against her ante-nuptial creditors, and no settlement made by her is to be more valid against her creditors than it would be if made by a man against his creditors; so that a post-nuptial (and voluntary) settlement by a married woman will be unavailing, even though it contains a clause against anticipation, against her ante-nuptial creditors, and it will be liable to be set aside by any creditor under 13 Eliz. c. 5, on the ground of its being fraudulent, or by her trustee under the bankruptcy laws; and with regard to the investments which the act authorizes the woman to make, it is provided, for the protection of the husband, that if any such investment be made by means of the moneys of the husband without his consent the court may on application, as prescribed by the Act, order the investments, and the dividends or any part thereof, to be transferred and paid respectively to the husband. To prevent creditors being defrauded by the husband giving property to his wife in order to avoid the seizure of the same for his debts, it is provided that nothing in the act is to give validity as against creditors of the husband to any gift by the husband to the wife of any property which after such gift continues in the order, disposition, or reputed ownership of the husband, nor is it to give any validity to any deposit or other investment of moneys of the husband, made by or in the name of the wife in fraud of his creditors, but such moneys or investments may be followed as if the act had not been passed. Lastly, the act casts certain positive obligations on the woman, by providing that justices may, on the application of the guardians of the poor, issue a summons against the wife of a man who has become chargeable to any union or parish, and an order may be made and enforced against her for payment out of her separate estate, in the same way as an order may be made and enforced against a husband for the maintenance of his wife under 31 & 32 Vict. c. 122, s. 39. And a married woman possessed of separate estate, is now made subject to all such liability to support not only her children, but also her grandchildren as the

husband is now subject to; but this is not to relieve the husband from any liability imposed on him to maintain his wife, children, and grandchildren.

The Married Women's Property Acts, then, cannot be said to diminish to any important extent the practical utility of a marriage settlement. Indeed, that which is perhaps the main object of a settlement—the provision for the children of the marriage—is entirely untouched by them; and independently of the provisions made by a settlement there is nothing to prevent either husband or wife from squandering away their respective properties at their own free will, and at their death leaving the children utterly unprovided for. We shall devote the first portion of our remarks on this subject to the ordinary form of settlement which is primarily applicable to personal estate, but under which, as we shall hereafter see, real property can be settled, so as to be enjoyed by the husband and wife *in specie*; and in the second part of our observations we will deal with what are known as strict settlements of land, and the provisions of the Settled Estates Act, 1877, and of the Settled Land Act, 1882, affecting them.

CHAPTER II.

SETTLEMENTS OF PERSONAL PROPERTY.

By the fourth section of the Statute of Frauds, all agreements in consideration of marriage must be in writing and signed by the party to be charged thereby or his agent; and in practice settlements are always carried out by deed. The first function of the settlement is to vest the property proposed to be operated upon in the trustees, who are to be appointed to carry out the provisions of the settlement. The first question which will arise will be, how is this vesting of the property in the trustees to be carried into effect?

I. How the Trust Property is vested in the Trustees.

The mode by which the property the subject of a settlement is vested in the trustees will depend on the nature of the property, and also on the character of the dealings which it may be proposed to have with it under the trusts of the settlement. If the property is of such a nature that it will pass by delivery, as in the case of personal chattels, or by transfer in the books of banks or companies, as in the case of government stock, shares, &c., or by some deed in a statutory form, as in the case of railway debentures, the property will be vested in the trustees in the appropriate way as if they were purchasers, and the transfer will be recited in the settlement as having been made, it being expressly stated that the transfer is or has been made in trust for the owner until the solemnization of the intended marriage, and after that has taken place then upon the trusts contained in the settlement concerning the same.

Where the proper mode of transferring the property is by deed, the question may arise whether the transfer should be effected by the settlement itself, or whether a separate deed should be employed. Which of the two courses should be pursued will depend

on the answer to the question—Supposing the trustees are by the terms of the settlement to have the power to sell the property and to transfer it to a purchaser, will the assignment to them form a part of the title deeds to which the purchaser will be entitled? If an affirmative answer is given, it will be proper to effect the transfer by a separate deed, so that the settlement and its trusts may not become part of the title of the purchaser or transferee. (See *Capper v. Terrington*; *Dobson v. Land*.) Thus, if the property settled be a debt secured by a mortgage owing to the settlor, it will be more convenient to have the transfer to the trustees made by a separate deed, so that when the mortgage is paid off the settlement may form no part of the title deeds to which the mortgagor will be entitled. If such a plan be adopted the settlement would recite the mortgage and the transfer, and then proceed to declare the trusts. But where it is not intended that the trustees shall be empowered to dispose of the property, the assignment may be made by the settlement itself. Thus, if the property consists of a reversionary interest in personal estate (which must be assigned by deed), the assignment may be incorporated in the deed of settlement itself; for there is here no intention to deal with it by way of disposing of it subsequently; but the idea is that the trustees shall hold it till it falls into possession. If the property consists of land, and it is not desired to put it into strict settlement, the usual course is to convey the land to the trustees upon trust to sell, and then to hold the proceeds upon the trusts of the settlement. Such a direction will, as you know, by the doctrine of conversion, operate to impress the land with the character of personalty, and the ordinary clauses and provisions of a settlement of personalty can be made to apply. The land is conveyed to the trustees to the use of the owner and his heirs until the celebration of the intended marriage, and afterwards to the use of the trustees upon trust, at the request in writing of the husband and wife during their joint lives, and afterwards of the survivor, and after the death of the survivor at the discretion of the trustees, to sell. This plan prevents the land from being sold, unless the husband and wife during their lives, or the survivor after the death of one of them, desire it. The result is that, as there will be no need to sell the land, it may be enjoyed by them *in specie*, just as freely as if it had been settled by a strict settlement. And another advantage of this plan

is, that when the time comes for dividing the property among the children all danger of an action for partition will be obviated, since there will be no right in any one child to insist upon its being divided in its form as land. In connection with such a settlement as this the provisions of sect. 63 of the Settled Land Act, 1882, as read with sect. 6 of the Settled Land Act, 1884, must be borne in mind. They will be treated of in a subsequent page.

II. The Covenant to Settle After-acquired Property.

We now come to speak of the after-acquired property of the wife, which it is usual to include in the settlement. This property will now, in consequence of the Married Women's Property Act, 1882, be sufficiently protected from all claims by the husband (save that the act imposes no restraint upon her anticipating the income thereof and handing the same over to the husband); but the children of the marriage will derive no special benefit from such after-acquired property, unless it be expressly conferred on them by a settlement. Thus it will still be necessary to follow the old plan, and to include in the settlement the property which the wife may acquire or which may devolve on her after the marriage.

The plan adopted for settling such property of the wife is usually to insert in the settlement a covenant by both the husband and the wife (but as the husband will in future have no rights in such property the covenant might be by the wife alone) that they will convey their interests in the property to the trustees; or sometimes it takes the form of an agreement and declaration by both parties that such property shall be subject to the settlement. In framing such a covenant or agreement and declaration great care should be exercised, and amongst others the following points should be borne in mind:—

The covenant should include property to which the wife is entitled at the date of the settlement, if it is intended that it should comprehend property in which she has a reversionary interest at that time, but which does not fall into possession until the coverture has determined. (See *Agar v. George*.) If the covenant be merely to settle property to which the wife, or formerly the husband in her right, shall become entitled during the coverture, as the words "shall become entitled," import a change of con-

dition, so the covenant will not include property in which she has at the date of the settlement a vested interest in possession, or in which she has a reversionary interest, which, however, does not fall into possession until the coverture has determined. (See *Re Mitchell's Trusts*.) But such a covenant will include such reversionary property if the interest fall into possession during the coverture, for there is here a sufficient change of condition. (See *Archer v. Kelley*.) A covenant to settle the wife's after-acquired property, if made by the wife (*Butcher v. Butcher*), but not so if entered into by the husband alone (*Travers v. Travers*, and see *Dawes v. Treadwell*), will bind separate estate subsequently acquired, unless a restraint on alienation is annexed to the separate use. (*Coventry v. Coventry*.) But in a recent case it was held that property which is the wife's for her separate use by virtue of the Married Women's Property Act, 1882, will not be bound by a covenant in a settlement, made before 1883, to settle property to which she becomes entitled for her separate use. (*Re Stonor*.) Lastly, note that the general form of covenant will, where the intention otherwise is not clearly expressed, only bind property acquired during the husband's lifetime. (*Dickinson v. Dillwyn*, *Re Edwards*, and *Re Campbell's Policies*.)

A covenant by the husband alone will, in future, be valueless; for the Married Women's Property Act, 1882, takes away all his interest in property which comes to his wife after the 31st December, 1883.

III. Provision for an immediate Income.

Sometimes in order to provide an immediate income for the married couple (which may be necessary when the property settled is of a reversionary nature and may not fall into possession for some time, as where a son about to marry is entitled to property on his father's death, and puts that into the settlement), the father of the intended husband or of the intended wife covenants with the trustees that he will pay them an annuity to be applied for the benefit of the young couple. In such a covenant the father generally binds himself to pay the annuity during the joint lives of himself and the son or daughter about to be married, provided the intended husband or wife or any issue of the intended marriage so long live. The money payable under such a covenant is settled in the same way as the reversionary interest is settled.

IV. Settlement of a Life Policy.

Another kind of property which is often put into a settlement by the intended husband is a policy of assurance. He insures his life, and then assigns the policy and the sum assured to the trustees, who are directed to hold them on the trusts expressed as to the general bulk of the property settled. The husband covenants not to do any act to render the policy void, to effect a new policy in case it should become void by any means, to duly pay the premiums and to deliver the receipts therefor to the trustees upon demand. As it will be the duty of the trustees in most cases to keep up the policy, they may, in the event of the husband making default in paying any premium, pay it out of their own moneys, and if they do so they will be entitled to reimburse themselves the money so paid, and will further have a lien on the policy for moneys so paid, and may transfer this lien to any third person who advances money to them for the purpose of paying the premiums. (See *Re Leslie*.) And, as the trustees may have no available fund for the premiums, the settlement should expressly provide that the trustees shall not be responsible for any lapse of the policy which may occur. Should there be any chance of a bonus being declared on the policy, as this, in the absence of stipulation, goes in accumulation of the sum which the assured will receive on his death, it is sometimes stipulated that the trustees may, at the request of the husband, instead of treating such bonus as capital, authorize the husband to take advantage of the option usually given to the assured by the company, and have the bonus applied in the reduction of the amount of the premiums. Powers are sometimes given to the husband to redeem the policy on his paying to the trustees a stipulated sum, which is to be subject, when paid, to the trusts of the settlement, and provision is then made for the re-assignment of the policy to the husband.

V. Settlements by Infants.

With regard to the parties to the settlement, the Infants' Settlement Act (18 & 19 Vict. c. 43) authorises infants (*i. e.*, males at any time after the age of twenty, and females at any time after the

age of seventeen) to make binding marriage settlements of their property, real and personal. It is necessary, however, to apply in a summary way to the Chancery Division, and obtain the sanction of that court to the settlement. This will generally be granted as a matter of course, and without any inquiry being directed as to the propriety of the contemplated marriage. (See *Re Dalton*.) The act has a qualifying proviso to the effect that an appointment under a power or a disentailing deed executed by an infant tenant in tail under the act shall, in the event of the infant dying under the age of twenty-one, be absolutely void.

It was formerly held that the act did not authorize a post-nuptial settlement of the property of the wife (*Re Potter*); but in *Re Sampson and Wall* it was decided that the act was sufficiently wide to authorize a post-nuptial settlement of the property vested in the wife, if it be made on the occasion of the marriage. The same case shows that the court has no power under the act to compel the infant, if unwilling, to execute a settlement; a defect which has been remedied by the Judicature Act, 1884 (47 & 48 Vict. c. 61, s. 14), which provides that if a person neglects or refuses to execute an instrument when ordered to do so, the court may order some other person to execute the instrument, which is then to have the same force and effect as if executed by the person originally directed to execute the same. (See *Edwards, In re, Owen v. Edwards*.)

VI. Covenants for Title.

Connected with the vesting of the property in the trustees is the question, What covenants for title should the settlor enter into? Formerly, especially where the property settled was land or a policy of assurance, it was usual to make the settlor enter into full covenants for title. But this is by no means a good plan. For the settlor is generally the husband, and in case of a breach of a covenant it would be the duty of the trustees to sue him on the covenant. To do this would obviously affect not only the husband himself, but the wife and children of the marriage through him, and, indeed, would in most cases, instead of being a benefit to the latter, operate to their prejudice by perhaps ruining the husband. So that the usual course is not to insert any covenant by the settlor,

other than a covenant for further assurance. This covenant need not now be inserted in express terms, for it may be implied by virtue of sect. 7 of the Conveyancing Act, 1881, which provides that every person who conveys and is expressed to convey "as settlor," shall be deemed to covenant for further assurance, and this covenant will extend to the acts of every person claiming under the settlor, either by deed or act and operation of law in his lifetime, subsequent to the settlement, or by testamentary disposition, or by devolution of law on his death.

VII. The Trusts of the Settlement.

The property having been vested in the trustees, the next function of the settlement is to declare the trusts upon which they are to hold it. The first of these will be to hold it upon trust for the settlor until the intended marriage. The object of this trust is, of course, that if the intended marriage does not take place, the ownership of the property shall not be altered. Thus, if it were to turn out that the parties were within the prohibited degrees, so that marriage was impossible, the first trust would then take effect. (See *Paicson v. Brown*.) But it has been held, that where both parties are at the date of the settlement aware of the impossibility of the marriage taking place, the court will not, if there has been a completed transfer, do away with the effect of the settlement. (*Ayerst v. Jenkins*.) But as a general rule, where the marriage is broken off after the execution of the settlement, the parties may revoke the settlement, and this even where they have after its execution cohabited together without marrying. (*Essery v. Cowlard*.) In *Page v. Horne*, where the intended husband induced the intended wife to revoke the settlement, it was held that the revocation under these circumstances was void.

The next trust is, that after the solemnization of the intended marriage, the trustees shall hold the property, and either retain it in its existing state, or (generally with the consent in writing of the husband and wife during their joint lives, and of the survivor after the death of one of them, and on the death of the survivor, then at the discretion of the trustees) sell the same and invest the proceeds, with a power to vary the investments from time to time

with the same consents, and then to stand possessed of the property, or the proceeds of the investments thereof, upon trusts which will vary according as the property was brought into the settlement by the husband or the wife; for, as we have mentioned before, the property may come from either the intended husband or the intended wife; if it comes from the former, the general plan is to vest it in the trustees upon trust for the husband for life; but if it comes from the wife, the first life interest in the income is generally given to her for her separate use, without power of anticipation. Sometimes, however, the first life interest in the income of the whole estate, wherever it comes from, is given to the husband, and when this is done, it is proper to charge it with the payment to the wife of an annual income during the coverture. This latter plan is usually adopted when the husband is not in business, or is not earning an income from some trade or profession. But where he is engaged in business, or in the exercise of a profession, it is advisable to give the wife the first life interest in her own property; firstly, because it is to be presumed that the husband is deriving an income from his business or profession, and so will not stand in need of the income of his wife's property; and secondly, because it operates to protect it from the obligations he may incur to his business creditors.

With regard to these life interests the following points should be noted. To protect the life interest of the husband from any obligations he may incur in business it is usual, especially when the trade he carries on is of a hazardous nature, to make it determinable on his bankruptcy, or on his attempting to alien or charge it. The law with regard to such limitations is that they are valid when the property in which the husband takes the life interest comes from the wife or from some person other than the husband himself (*Dommett v. Bedford*); but when the property comes from the husband himself, they will be invalid as against his trustee in bankruptcy (*Higginbottom v. Holme*), but good as against his alienees. (*Brooke v. Pearson*; *Knight v. Browne*.) Again, the interest cannot be so limited as to continue in the husband after his bankruptcy or alienation: there must be a gift over, or the destination of the income during the rest of his life must in some way be provided for. (*Brandon v. Robinson*.) But where the husband receives part of his wife's property upon the marriage and

then settles property of his own upon himself, with a gift over on his bankruptcy, this limitation of his own property will be valid as against his trustee in bankruptcy; for in such a case the wife is considered as a purchaser to the extent of the property belonging to her which has been received by the husband. (*Mester v. Garland*.) The limitation is generally deemed to refer to a bankruptcy, &c. occurring after the marriage, but it has been held that it would take effect even where the husband was an uncertificated bankrupt at the date of the settlement (*Manning v. Chambers*); and further, where the bankruptcy was annulled before the interest limited fell into possession, it was held that the husband's life interest was not determined under such a limitation. (*White v. Chitty*; and see *Ancona v. Waddell*.) Further, it has been held that where the life interest is given subject to a gift over on the husband's attempting to alien, assign, or mortgage it, and there takes place an involuntary alienation, *e. g.*, by bankruptcy, the husband does not in such a case forfeit his life interest. (*Whitefield v. Prickett*.) But the contrary has been held to be the case where the gift over was to take effect upon the husband "doing or suffering anything whereby the property might be assigned or charged." (See *Ex parte Eynston*.)

With regard to the restriction upon anticipation annexed to the life interest conferred by the settlement on the wife, this will apply to property which is hers for her separate use under the Married Women's Property Act, 1882, as well as to other separate property; for sect. 19 of that act expressly provides that nothing in the act shall interfere with or render inoperative any restriction on anticipation.

The next trust is concerned with the destination of the settled property or the income of the investments thereof upon the decease of one or other of the husband or wife. Upon such decease occurring it is usual to give the income to the survivor for life. After the decease of the survivor the trust is for such child or children or remoter issue of the intended marriage at such age or time, or at such ages or times, not being earlier as to any object of the power than his or her age of twenty-one years, or day of marriage, in such shares, if more than one, and on such conditions and in such manner as the husband and wife shall by deed or deeds jointly appoint, and in default of appointment as the survivor shall by deed

or will appoint, and in default of such appointment, then in trust for all the children of the intended marriage, who being sons shall attain the age of twenty-one years, or being daughters shall attain that age or shall marry under that age, in equal shares; and if there is but one child, then in trust as to the whole fund for that one child.

We must now leave the settlement for a while and consider a few points which arise in connection with the appointment under a power such as that given above. You will remember that prior to the 16th July, 1830, it was necessary under a non-exclusive power, *i. e.* one which did not give to the appointor an option of excluding any object intended to be benefited by the power, for the appointor to appoint a portion of the fund to every object of the power. At law it was immaterial how small the share appointed to any object might be; but in equity it was necessary to appoint some substantial share, or the appointment was held *illusory* and void. (*Gainsford v. Dunn.*) But then was passed the statute 11 Geo. 4 & 1 Will. 4, c. 46, which rendered illusory appointments, *i. e.* appointments of merely nominal shares, good in equity as well as at law. But under this statute it was necessary to appoint some share, however small, to each of the objects of the power. (See *Gainsford v. Dunn.*) Now, however, in the exercise of a power of appointment after the 30th July, 1874, it is possible entirely to exclude any object of the power by virtue of 37 & 38 Vict. c. 37, unless there is some express declaration to the contrary in the instrument creating the power.

It will be observed that power is given to appoint a share to the "remoter issue" of the marriage. This will enable the husband or wife to appoint a share to the issue of a deceased child, or of a child who has become bankrupt or aliened his interest under the settlement. It might be thought that such a power would be void as offending against the rule against perpetuities, for it might happen that no issue might be born to the child of the marriage within the time allowed by the rule, *i. e.* a life or lives in being and twenty-one years afterwards. But the power may be validly exercised, provided the appointment under it be made so that the property must vest within the limited time. (See *Routledge v. Dorrell.*) The remoter issue are included, because the rule is that when a power is given to appoint among children, no appointment can be made even to the executors or administrators of those who may have

died (*Boyle v. Bishop of Peterborough*); and if the power be to appoint among the members of a particular class, the fund cannot be appointed to a person who is not a member of that class. So that a power to appoint property to the children of the appointor will not enable the donee thereof to appoint to a grandchild. (*Alexander v. Alexander*, and *Bristowe v. Warde*. See also *Waring v. Lee*.) Again, under a power to appoint to younger children, a younger son, who afterwards becomes the eldest by the decease of an elder brother, can take nothing (*Chadwick v. Dolman*), though if any appointment has been made to him he will not have to refund. The words “younger brother” in powers of this nature mean any child who may not be entitled to the family estate. (See *Hall v. Hewer*.) When the power only authorizes an appointment among children, an appointment may still be made to the issue of a child, it being looked upon as an appointment to the child and an assignment by him to his issue. (*Routledge v. Donne*; *Thompson v. Simpson*.) But as this can only be effected when the child is of age and is a party to and executes the deed of appointment, it is, as above stated, desirable to extend the power of appointing the trust funds to remoter issue.

With regard to the execution of powers, the following points are noticeable:—A married woman may execute such a power, whether coupled with an interest or not, without the necessity of the joinder of her husband or the acknowledgment of the deed by her. (*Doe v. Eyse*.) As an infant cannot make a will, he cannot execute a power of appointment by will, and as to the execution thereof by deed he cannot appoint real property unless the power be one which is simply collateral (*Hearle v. Greenbank*); and as to powers to appoint personal property he may by deed exercise them, whether they are collateral, in gross or appendant, at the age at which he may by law dispose of personalty to which he is absolutely entitled, *i. e.* when he is of a sufficient age to understand what he is doing. (*Re D'Aubigan*; *Palmer v. Locke*.) It results that an infant may execute the ordinary power of appointment among children contained in a marriage settlement. But with reference to real estate, powers appendant and in gross can only be exercised by an infant if the donor expresses an intention that the power shall be exercised. It will perhaps be hardly necessary to remind you that a power simply collateral is one where the donee has a mere mandate to execute the power without any interest in the property; that a

power appendant is one coupled with an interest and capable of affecting such interest, *e. g.* a tenant for life's power of leasing; and that a power in gross is one coupled with an interest in the donee, but not capable of affecting such interest, *e. g.* a power of jointuring a wife.

The question may arise whether, on the execution of the usual power in a settlement to appoint among children, an appointment may be made to daughters and at the same time a restraint imposed upon anticipation, or whether the imposing of such a restraint will not offend against the perpetuity rule. The appointment will in any case be good even if the restraint be invalid as transgressing the rule (see *Fry v. Capper*); but the restraint will in some cases be upheld, and in other cases not. (See *Buckton v. Hay*; *Cooper v. Laroche*; *Herbert v. Webster*.) If the daughter was unborn at the date of the creation of the power, the court will reject the words creating the restraint as infringing the rule. (*Buckton v. Hay*.)

In the exercise of the power the perpetuity rule may be transgressed in other cases. Thus, an appointment may be made under the power usually inserted in settlements to such uses as a child of the marriage may by deed or will appoint; but if the appointment be made to him to such uses as he shall by will alone appoint, this will offend against the rule and be void, unless the child was born at the time of the creation of the power, so as to be a life in being. (See *Jebb v. Tugwell*; *Morgan v. Gromow*.)

Again, in executing the power, there are two points to be avoided—the excessive execution of the power and a fraudulent exercise of it. If the appointment include objects not intended by the terms of the power to be benefited, the appointment will not be altogether void, but it will be void as to the excess only, and good as to the shares intended for the objects of the power, provided they can be separately ascertained. (*Re Kerr's Trusts*.) And a fund, instead of being directly appointed to an object of the power, may be appointed to a trustee in trust for him (*Thirnton v. Bright*); or it may be appointed to trustees upon trust to sell and divide the proceeds among the objects. (*Fowler v. Cohn*.)

As to what constitutes a fraudulent exercise of a power, the rule is that it must be exercised for the benefit of the child, and not indirectly for the father's own benefit; so that if the power be exercised with an ultimate view to secure some advantage to the appointor, or to any person other than an object of the power, the appointment will be

void. Thus, a father will not be allowed to make an immediate appointment to an infant child with the idea of becoming entitled to the fund as the child's personal representative if he should die. (*Cunningham v. Thurler*; *Wellesley v. Mornington*.) But the mere fact that an appointment is made to an infant, and that the father, the appointor, will become entitled to the fund on the child's decease, will not necessarily render the appointment void. (*Butcher v. Jackson*; *Beere v. Hutchinson-Hoffmister*; see also *Henty v. Wray*.) In *Wellesley v. Mornington* the child of the appointor, the object of the power, was in bad health, and the appointment being made by the appointor with a view to obtaining a succession to his property, was held void.

An appointment when once made cannot be revoked unless the appointor reserve to himself a power of revocation, which he may do though the instrument creating the power gives him no authority to make such a reservation. But where an irrevocable appointment has been made conferring benefits on certain objects, and a deed is subsequently executed by the appointor, attempting to revoke it, and at the same time conferring other benefits upon those objects, they may be required to elect between those benefits and the property appointed. (See *Bickersville v. Rodger*.)

As to the release and disclaimer of powers, formerly the rule was that powers appendant and in gross could, but those simply collateral could not, be released. (See *West v. Burney*.) But by sect. 52 of the Conveyancing Act, 1881, a person to whom a power coupled with an interest or not is given, may by deed release or contract not to exercise the power, and this whether the power was created by an instrument coming into operation before or after the commencement of the act. This section did not, however, apply to the disclaimer of powers, and this omission was supplied by the Conveyancing Act, 1882, sect. 6, under which the donee of a power, whether coupled with an interest or not, and whether created by an instrument coming into operation before or after the commencement of the act, may by deed disclaim the power, and the effect of such disclaimer will be that he will not be able to exercise, or join in exercising, it; but it may be exercised by the others or other, or the survivor of the other persons to whom the power was given, unless the contrary be expressed in the instrument creating the power. Under sect. 52 of the Conveyancing Act, 1881, it has been held that a power which is coupled with a trust or duty may not be

released, but can only be extinguished by the trustee making a proper and irrevocable appointment. (*Eyre v. Eyre.*)

We must now leave the subject of powers and return to the settlement. The general trust, in default of appointment for the children of the marriage in equal shares, is qualified by the insertion of what is known as the hotchpot clause. This clause declares that no child to whom any share has been appointed shall, in default of appointment to the contrary, take any share in the unappointed part without bringing his appointed portion into hotchpot and accounting for the same. The object of the clause is to prevent any child to whom an appointment has been made from taking, in addition to the property appointed to him, a share in the residue which remains unappointed equally with children to whom no appointment has been made. Thus, suppose there were a fund of 4,000*l.*, and there were three children of the marriage, and to one of them, A., 1,000*l.* had been previously appointed by the father. If the remainder of the fund, 3,000*l.*, were left unappointed, each child, including A., would, in the absence of a hotchpot clause, be entitled to 1,000*l.* each, and A. would thus get 2,000*l.*, while the other two children would only get 1,000*l.* each. But under the operation of a hotchpot clause A. would have to bring into account the 1,000*l.* previously received by him as a condition of his receiving a share of the remaining 3,000*l.*, so that he would only get 333*l.* 6*s.* 8*d.* of the unappointed sum, which, together with the 1,000*l.* he had previously received, would amount to 1,333*l.* 6*s.* 8*d.*, or one-third of the whole trust fund, a share equal to that received by each of the other children. It has been held that a hotchpot clause will not be implied in a settlement. (See *Re Alfreton's Trusts.*)

An advancement clause should also be inserted in the settlement, in order to enable the trustees to raise a part of an infant child's vested or presumptive share and apply it for his advancement, preferment or benefit. The clause as usually framed authorizes the trustees, with the consent in writing of the parents during their joint lives, and of the survivor during his or her life, and after the death of the survivor at the discretion of the trustees, to raise any part not exceeding one-half of the vested or expectant share of any child or issue of the marriage, and to apply the same for his advancement or benefit as the trustees may think fit. Note that

this power must still be expressly inserted, and is not implied by sect. 43 of the Conveyancing Act, 1881, which merely allows the income of trust funds to be applied for the maintenance, education and benefit of infants.

It was further usual to insert a maintenance and accumulation clause, in order to provide for the destination of the trust property, should the parents die during the minority of the children. This clause generally empowered the trustees to apply the whole or part of the income of the expectant share of any infant child for his maintenance and education, and to accumulate the residue and add the accumulations thereof to the capital of the share. A clause of this kind was impliedly annexed to settlements executed after the 28th August, 1860, by Lord Cranworth's Act, s. 26. But this provision has been superseded by sect. 43 of the Conveyancing Act, 1882, which enacts that where property is held by trustees in trust for an infant *either for life or any greater interest, and whether absolutely or contingently on his attaining twenty-one, or the occurrence of any event before his attaining that age, the trustees may at their sole discretion pay to the infant's parent or guardian (if any), or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purposes, or any person bound by law to provide for the infant's maintenance or education or not. The trustees shall accumulate the residue of that income at compound interest for the benefit of the person who ultimately becomes entitled to the property. Provided that the trustees may apply the accumulations, or any part thereof, as if the same were income arising in the then current year.*

This provision extends to instruments coming into operation either before or after the commencement of the act, and may be excluded or varied by the settlement. As the income is by the act payable to the parent of the infant as well as his guardian, it may be advanced to the mother for the infant's benefit after the death of the father, though she may not be the infant's guardian, as where the father has appointed a guardian under 12 Car. 2, s. 24. (See *Re Cotton*.) Under the clause implied by the act an advancement may be made for the general benefit of the infant, and not merely for his maintenance or education, and the ex-

pression "benefit" gives the trustees a very wide discretion. (See *Louther v. Bentinck*.) They may apply past accumulations of income in recouping the father of an infant what he has paid for the infant's maintenance. (*Re Pitt's Settlement*.) Under the clause as implied by Lord Cranworth's Act, the advancement could only be made out of the income to which the infant "might be entitled," which was held not to enable an advance to be made where the infant on attaining twenty-one would not be entitled to interest on his share or legacy, as the case might be, till the payment of the share itself. Thus, in *Re George*, where a legacy was given by her father to G., "if and when she should attain the age of twenty-one," and an annual sum was set aside for her maintenance during minority, it was held that no interest was payable during minority on the legacy, and that Lord Cranworth's Act did not apply, as it only was available in cases where the infant was either entitled absolutely to the principal and income, or was entitled to the principal contingently in such a manner that he would, on coming of age, become entitled to the income also; and though it was thought that the Conveyancing Act, 1881, would now meet such a case as *Re George*, it has been held, in *Re Dickson, Hill v. Grant*, that the principle of *Re George* is applicable to sect. 43 of the Conveyancing Act. In this case contingent legacies were given to persons not the children of the testator, and in consequence such legacies did not carry interest in favour of the legatees before vesting, but such intermediate interest or income went to the residuary legatee. It was held by the Court of Appeal that sect. 43 of the act did not apply, and the income could not be used for the maintenance of the legatees.

In general the express clause for maintenance may now be omitted in reliance on the statutory clause. But this will not be applicable where the vesting of the fund is postponed till after the age of twenty-one, or where the infant's interest is defeasible. (See *Re Buckley*.) Such a case cannot, however, occur under a marriage settlement, as the vesting of shares must take place within twenty-one years, or the limitation would be void as offending against the perpetuity rule.

It will be noticed that the Conveyancing Act allows the money to be advanced for the infant's maintenance, whether or not there is any person bound by law to provide therefor. Previously it was

doubtful whether the father, when able to maintain the infant, could insist on the children being maintained in exoneration of his legal duty, and it depended on whether the clause was in the form of a trust, and on the wording of the clause, whether he could so insist or not. (See *Ransome v. Burgess*; *Wilson v. Turner*.) If there was a mere power to advance, as distinguished from a trust, the father would have no right to call on the trustees to make an advancement; and it was held in *Brophy v. Bellamy*, that where the trustees had a discretion to maintain the children, without reference to their father's ability to do so, the court would not interfere with their discretion if exercised *bonâ fide*. These questions have now, however, ceased to be of importance.

It has been recently decided that trustees have, under sect. 43 of the Conveyancing Act, 1881, power to allow maintenance, although the trust instrument directs the income to be accumulated till the *cestui que trust* becomes absolutely entitled to the fund, such a direction not amounting to evidence of a contrary intention within the section. (*Re Thatcher's Trusts*.)

The last trust of the property is concerned with declaring what shall be its destination if there be no child of the marriage who lives to attain a vested interest under the previous trusts. With regard to the property brought into the settlement by the husband, it is declared that it shall be held in trust for him absolutely. As to the property brought in by the wife, it is declared that it shall be held upon trust for her absolutely if she shall survive the coverture, but if she should die during the intended coverture, then "upon such terms as she, whether covert or discover, shall by her will appoint, and in default of such appointment, and so far as any such appointment shall not extend, in trust for the person or persons who, under the statutes for the distribution of the effects of intestates, would, on her decease, have been entitled thereto if she had died possessed thereof intestate, and without having been married; such persons, if more than one, to take as tenants in common in the shares in which the same would have been divisible between them under the same statutes."

The object of the lengthy trust, which is declared in the event of the wife dying during the coverture, is to exclude the husband from taking her property on her death. For if it were simply given to her absolutely, and she died before her husband, it would

constitute a reversionary chose in action, and the husband, on taking out administration, would be entitled to the whole of the property. The power of appointment by will is given to her, whether covert or discover, because if she has this power only in the event of her dying before her husband, it might happen that a will made by her during coverture would become void by the husband dying before her; for a will speaks from the death, and as at her death she would be discover, the power to make the appointment by will would not exist. (See *Willcock v. Noble*.) Where a married woman had a power during coverture to appoint by will, and also had an interest which would become hers absolutely for her separate estate, in event of her having no children and surviving her husband, and she made a will in exercise of the power during coverture, and survived the husband without having had issue, it was held that the will was good, as it was made during coverture, and she had the absolute interest. (*Bishop v. Wall*.) And the doctrine of *Willcock v. Noble* is not altered by the Married Women's Property Act, 1882, since it does not operate to empower a married woman to make a will during coverture so as to pass property which accrues to her after the death of her husband. If she make a will during coverture, it will only pass property which belonged to her for her separate use before she became discover: property which she acquires when discover is not separate property within the act, and does not become so till she is under coverture again. (*Re Price, Stafford v. Stafford*.) The words "died without having been married" should always be employed. If the words "died unmarried" are used in a settlement, they are deemed to mean "not under coverture at the time of her death." (See *Dalrymple v. Hall*.) The result would be that if the wife should die leaving a husband and an infant child, the infant child would take the property, and should it die under age, the husband, as its next of kin, would take its share, and so the wife's relations would be entirely excluded. (*Pratt v. Matthew*.) Again, the words "next of kin" should not be used in substitution for the more lengthy expression "the persons entitled under the Statutes of Distribution;" for "next of kin" include only the nearest blood relations in the same degree. (*Halton v. Foster*.)

VIII. Trustee Clauses.

We now propose to consider some of the usual clauses inserted in settlements with the object of conferring certain powers on the trustees. The most usual of these clauses are :—

- (a) The Investment Clause.
- (b) The Receipt Clause.
- (c) The Power to compound and settle Claims.
- (d) The Indemnity and Reimbursement Clauses.
- (e) The Power to appoint new Trustees.

Before offering a few words on each of these clauses, we may notice that powers given to trustees are not usually given to them and their “assigns,” for it is not the intention that they shall be exercised by any person to whom an assignment may be made by them. They are to be exercised by the trustees themselves, and by new trustees, who may be from time to time appointed under the settlement, and these latter derive their capability to exercise the powers not from the original instrument, but from the deed which appoints them. Further, it is not necessary to confer the powers expressly on them, “and the survivor or survivors of them,” as was formerly done; for by the Conveyancing Act, 1881, s. 38, a power or a trust vested in two or more persons jointly, unless the contrary is expressed in the instrument creating the power or trust, may be exercised by the survivor or survivors of them. Trusts could always have been executed by any person who was for the time being the owner of the legal estate in the trust property. So that where land was devised to two or more persons upon trust that they or their heirs or assigns should sell, the survivor or survivors of such persons, and the heir of the survivor, independently of the act, could have sold (*Morton v. Hallett*); but with regard to powers which were simply collateral, these could not be exercised by any persons other than those to whom they were expressly given. The above section, you should notice, applies equally to mere powers as to trusts, but only applies when the instrument creating the trust or power comes into operation after the commencement of the act, *i.e.*, after the 31st December, 1881.

(a) *The Investment Clause.*—Independently of express provision and of statutory enactment, trustees can only invest in 3½ per cent. Annuities. But by virtue of various statutes, they may now, unless expressly forbidden by their trust instrument, invest in any parliamentary stocks, or in public funds, or in any security the interest of which is guaranteed by act of parliament (30 & 31 Vict. c. 132, s. 2); but this does not authorize investments on Indian railway debentures, though the principal and interest be guaranteed by the Indian government (*Green v. Ansell*); in Bank of England or Ireland Stock (22 & 23 Vict. c. 35, s. 32), in East Indian Stock (*Ibid.*), or in real securities in the United Kingdom. If authorized to invest in government or parliamentary securities, they may invest in Bank Stock, East India Stock, Exchequer Bills, in Consolidated Reduced and New 3½ per cent. Annuities, in Metropolitan Consolidated Stock (34 & 35 Vict. c. 47, s. 73), and on mortgage of freehold or copyhold estates in England or Wales (23 & 24 Vict. c. 38, s. 11; and Gen. Ord. 1st Feb. 1861), and they may make these investments even if the trust instrument contains a general prohibition of investments other than those expressly authorized. (*Re Wedderburn.*) If authorized to invest in real securities they may invest in charges under the Improvement of Land Act, 1864, unless expressly forbidden, and if authorized to invest in colonial government securities, they may invest in securities of the government of the Isle of Man. (43 & 44 Vict. c. 8.) If empowered to invest generally on the securities of shares, stock, mortgages, bonds, debentures of companies incorporated by, or acting under, the authority of act of parliament, they may invest in mortgage debentures issued under the Mortgage Debenture Act, 1865, and if empowered to invest in debentures or debenture stock of railway or other companies, they may, unless expressly prohibited, invest in any nominal debenture or nominal debenture stock, issued under the Local Loans Act, 1875, and if they are authorized to invest in the mortgages or bonds of a company, they may, under the Debenture Stock Act, 1871, invest in the debenture stock of such company. And where they hold money in trust to lay it out in the purchase of land to be settled in strict settlement, they may invest it, with the consent of the tenant for life, in the investments authorized by the Settled Land Act, 1882, s. 21, which, *inter alia*, authorizes investments in debentures and deben-

ture stock of railway companies in Great Britain or Ireland, incorporated by special act of parliament, and having for ten years next before the investment paid a dividend on its ordinary stock or shares.

The power to invest implies a power to vary the investments and, as a rule, to sell the property where, for instance, it consists of stock, and to reinvest it in any security authorized by law. (*Re Clergy Orphan Corporation.*)

As to the precautions a trustee should take on investing on mortgage we have already spoken. (See *ante*, p. 198.) A power to invest in real securities will not authorize an investment in ordinary leaseholds, nor even in a long term of years, though it be unburdened by rent or covenants. (*Re Boyd's Settled Estates.*) By making improper investments the trustees will incur liability should any loss occur to the trust estate, and they will also be liable for not investing when they ought to have done so. Thus, if they ought to have invested in 3*l.* per cents. and do not do so the *cestuis que trustent* can charge them either with the amount which ought to have been invested, with interest at 4*l.* per cent., or with the amount of 3*l.* per cents. which could have been purchased had the money been properly invested. And if they have improperly used the trust funds in trade they can be charged with the profits actually made, or with interest at 5*l.* per cent. If a trustee makes improper investments, and some of the investments cause a profit and others a loss to the trust estate, but the profit exceeds in amount the loss, the profit belongs to the *cestui que trust*, and the loss must be sustained by the trustee. He cannot set off the profits made against the losses sustained. (*Farrar v. Farrar.*) But where trustees were empowered to invest either in public funds or real securities, and they did neither, it was held that they could not be called upon to do more than replace the principal, with interest at 4*l.* per cent., and could not be charged with the stock which might have been purchased. (*Robinson v. Robinson.*)

Trustees will not be liable for loss occasioned by the failure of bankers with whom money has been left pending a permanent investment, unless they have allowed the deposit money to remain on such deposit without sufficient reason. (*Johnston v. Newton.*) In a recent case (*Cann v. Cann*), where the money had been left on deposit for fourteen months, and was lost by failure of the bank, it was held that the trustee must make good the loss, since the period

was too long to allow trust money to remain on deposit. The court said the money ought to have been invested after six months.

A trustee is, however, apparently liable for loss occasioned by the fraud of his solicitor. (See *Bostock v. Floyer*; *Sutton v. Wilders*.) But in the recent case of *Speight v. Gaunt*, where a trustee, with the consent of his *cestui que trust*, had employed a broker to invest the trust moneys, and had allowed it to remain in his hands for investment, and the money was embezzled by the broker, it was held that the trustee was not liable for the loss, as he was simply acting in the ordinary way in which he, as a careful man, would have acted had the money been his own. (See also *Fry v. Tapson*, *ante*, p. 198.) But if trustees confide the management of the trust to their solicitor they are liable for any loss which may be occasioned by his fraud. (*Dewar v. Brooke*.)

(b) *The Receipt Clause*.—This was formerly inserted in settlements, because the rule was that a purchaser from a trustee was, in the absence of an express power to the trustee to give receipts, bound to see to the application of the money paid by him, except where (1) The trusts were of so complicated a nature that the purchaser could not be expected to go into them, as where they were for payment of debts generally. (*Elliott v. Merriman*.) (2) Where the trusts were simple, yet it was apparent from the trust instrument that the author of the trust contemplated the possibility of some of the *cestuis que trusts* being under disability at the time of sale. (See *Sowersby v. Lacey*.) (3) Where an intention to impose on the purchaser the duty of seeing to the application of the purchase-money could not reasonably be inferred. As you will remember, powers to give receipts which would discharge a purchaser were conferred by Lord St. Leonards' Act, s. 23, and Lord Cranworth's Act, s. 29. But these two enactments are now superseded by the provision of sect. 36 of the Conveyancing Act, 1881, which provides as follows:—The receipt *in writing* of any trustees or trustee for any *money, securities, or other personal property or effects* payable, transferable or deliverable to them or him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application, or being answerable for any loss or misapplication thereof. (2) This section applies to trusts created either *before or after* the commencement of

the act. In view of this provision, you need not now insert any receipt clause in a settlement, as the statutory power to give receipts is sufficiently extensive.

(c) *The Power to compound and settle Claims.*—A power to this effect was generally inserted in settlements; but it may now be omitted, and the provisions of sect. 37 of the Conveyancing Act, 1881, relied on. This section empowers an executor or two or more trustees acting together, or a *sole acting trustee*, where the trust instrument authorizes a sole trustee to exercise the trust, to accept any composition or any security, real or personal, for any debt or property claimed, and to allow time for payment of any debt, and to compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing whatever relating to the testator's estate, or to the trust, and to execute any such instruments, &c. as may seem necessary, without being responsible for any loss. These powers, *so far as they are conferred on trustees*, are only available in those cases in which the section is not excluded by the expression of contrary intention, but it applies to executorships constituted and trusts created either *before or after* the commencement of the act. The section only relates to debts due *to* the testator's estate, and does not empower the trustees to pay or allow or compromise debts payable *by* the estate, and trustees, in paying such debts, receive no statutory protection, and run considerable risk. (*Vide Forshaw v. Higginson.*)

The section does not seem to make any great alteration in the existing law as to executors or trustees; for, independently of this and prior enactments, executors and trustees could compound debts, &c. But in all cases where they did accept compositions, &c., they were laid under the *onus* of proving that it was beneficial for the estate that they should do so (*vide Ward v. Ward*); but now, under the new act, as they are directly empowered to accept compositions, and to compromise, &c., it would seem that it lies on the person beneficially interested to show that the composition, &c. was actually prejudicial. It will be observed that the section does not speak of administrators, and consequently they are not within its scope. (See *Clay v. Tetley.*)

(d) *The Indemnity and Reimbursement Clause.*—The insertion of this clause is generally useless: as usually framed it provided that

trustees should only be liable for moneys actually received by them, notwithstanding they signed receipts for the sake of conformity, and that each of them should be answerable only for his own acts and defaults, and that they might pay their expenses out of the trust property. A trustee, however, is indemnified, and has powers to this extent under the ordinary doctrines of equity, without the insertion of any express clause in the settlement which would give him no further protection; and moreover Lord St. Leonards' Act and the Settled Land Act, 1882, make such a clause implied in all deeds, wills or other instruments creating a trust. The express indemnity clause also exempted trustees from liability for dispensing with the investigation of a lessor's title on lending money on or purchasing leaseholds, or for lending money or purchasing property with less than a marketable title, or for the deficiency of any investment, or for any loss except such as occurred through their wilful default. This clause, however, was also practically useless, and now under the Vendor and Purchaser Act, 1874, and the Conveyancing Act, 1881, sect. 3, trustees are protected who dispense with the lessor's or under-lessor's title, on the purchase of a lease or underlease. Occasionally a very strong indemnity clause is inserted under which the trustee is protected from every default, &c. by a co-trustee, except when he actually colludes with him. (See *Wilkins v. Hogg*.)

The only provision of this nature which need be inserted in the settlement is one authorizing a trustee who is a solicitor, and who it is intended shall act as solicitor to the trust, to charge for professional services just as if he had not been appointed a trustee; for in the absence of such a power he will only be allowed costs out of pocket. (*Moore v. Froud*.) But even where a solicitor trustee is empowered to retain his professional costs he will not be allowed to charge for things which a trustee ought to have done without employing a solicitor, *e.g.*, attending at a bank to make transfers, &c. (See *Harbin v. Darby*; *Re Ames*.) It has, however, been held, that where one trustee is a solicitor, and an action is brought against the trustees, the solicitor trustee may be employed by his co-trustees to defend the action and recover his charges from the trust estate, even though he was not expressly authorized to make charges by the trust instrument. (See *Cradock v. Piper*.)

(e) *The Power to appoint New Trustees.*—It is now unnecessary to insert an express clause conferring powers to appoint new trustees; for the Conveyancing Acts of 1881 and 1882 incorporate into instruments creating trusts, dated either before or after the commencement of the act (unless the provisions thereof are excluded by expression of contrary intention), sufficiently ample powers for the purpose. It will be necessary to examine with some care the subject of the appointment of new trustees. Prior to January, 1882, there were three authorities under which such appointments might be made:—(1) By virtue of powers conferred by the author of the trust; (2) By the Chancery Division under the Trustee Act, 1850, s. 34; (3) By virtue of Lord Cranworth's Act. And now, by the Conveyancing Act, 1881, the following provision is made:—

Where a trustee (either original or substituted, and whether appointed by a court or otherwise),

- (a) Is dead;
- (b) Desires to be discharged;
- (c) Refuses to act in the trusts;
- (d) Is unfit to act;
- (e) Is incapable of acting;
- (f) *Remains out of the United Kingdom more than twelve months,*

the following persons may appoint new trustees:—

1. The person nominated for that purpose in the trust instrument;

or

(if there is no such person, or no such person able and willing to act), then—

2. The surviving or continuing trustees or trustee for the time being, and a “continuing trustee” will include one who has made up his mind to retire (*Re Glenny and Hartley*); or,
3. The personal representative of the last surviving or continuing trustee. Whether this will include the executor or administrator of a “sole” trustee is doubtful. (*Re Shafto's Trusts.*)

The difference between the powers given by this and Lord Cranworth's Act is, that the Conveyancing Act gives a power to appoint new trustees in every case in which the power applied by virtue of Lord Cranworth's Act; but it adds to that list the case of a trustee

remaining out of the United Kingdom for more than twelve months. *Permanent* residence abroad was formerly ground for removal of a trustee (*Re Bignold*); but it was always a question, upon the special circumstances of each case, whether or not the absence was such as to constitute incapacity or unfitness.

The case of a person who is appointed a trustee disclaiming the trusts does not seem to have been provided for by either of the above two statutes; so that if a person appointed to be a sole trustee disclaims, the act will not apply. For though the power to appoint new trustees applies where a trustee *refuses to act*, this does not include the case of a trustee disclaiming. For if he does not accept the trust, he is never a trustee, and cannot be comprehended under the description of a "trustee refusing to act." This is, however, a moot point. As to the persons authorized to make the appointment. Sub-sect. 1 of sect. 31 of the Conveyancing Act omits to name the "last retiring trustee," who was authorized to appoint a new trustee by Lord Cranworth's Act. But in sub-sect. 6 of sect. 31, it provides that a continuing trustee shall include a "refusing or retiring trustee," if willing to appoint new trustees, and vest the trust estate in them. Thus, to take an example,—if there are three trustees, A., B., and C., and A. died, B. and C. could retire, and at the same time appoint two new trustees. Thus, though appointing new trustees under a power given to continuing trustees, they would not actually have to continue to be trustees.

Under the ordinary express power to appoint new trustees the number of trustees could not be increased (*Rex v. Loxdale*); and under Lord Cranworth's Act the question arose whether the number of trustees originally appointed by the author of the trust could be varied. It was held in *Re Breary* that the original number of trustees could be increased, and that the donee of the power of appointment under that act could appoint two trustees in the place of an only trustee appointed by the settlor's will. The new act converts this judge-made law into statute law, and enacts, in sub-sect. 2 of sect. 31, that on the appointment of a new trustee (whether by virtue of an express power of appointment or under the powers given by the act), the number of trustees may be increased. And it further enacts (sub-sect. 3) that on the appointment of a new trustee it shall not be obligatory to appoint more than one trustee where only one trustee was originally appointed; nor shall it be

necessary to fill up the original number of trustees where *more than two* trustees were originally appointed: so that the new act enables the number of trustees to be *decreased* when they originally exceeded two in number. As a rule, the court would not decrease the number of trustees, except where in its opinion the original number appointed was excessive. (*Vide Re Harford's Trusts.*) This 3rd sub-section also provides that a trustee, on appointing a new trustee, shall not be discharged from his trust unless (a) on his retirement there be left at least two trustees to perform the trust; or (b) only one trustee was originally appointed. For example, if there were four trustees originally appointed, and three died, the survivor, in appointing new trustees, could reduce the number, but he would have to leave at least two trustees to carry out the trust; so that if he wished to retire, he could not appoint less than two new trustees, in order to be himself discharged. But if he himself intended to remain in office, he would not be bound to appoint more than one additional new trustee to act with him.

The next provision of the Conveyancing Act is that, on the appointment of a new trustee, any assurance or thing requisite for vesting the trust property jointly in the persons who are trustees, shall be done.

Every trustee so appointed, as well before as after *all* the trust property becomes vested in him, shall have the same powers, authorities and discretions, and may in all respects act as if he had originally been appointed by the trust instrument. The provisions of sect. 31, as to a trustee who is dead, include the case of a trustee of a will dying before the testator.

In *Warburton v. Sandys* it was held that the person to be appointed a new trustee was not invested with the character of trustee until he had both been appointed and the trust property had also been duly conveyed or assigned. But in *Noble v. Meymott* and *Welstead v. Colville* this doctrine seems to have been dissented from. In the latter case, on the death of a trustee, a new trustee was appointed, but the trust estate was not conveyed, and the surviving trustee and the new trustee then sold the estate and signed a receipt for the purchase-money; it was held that the purchaser from them acquired a good title. So, *Lewin* says, in his work on the Law of Trusts, p. 537, "it would appear that at the present day an actual conveyance of the legal

estate is not essential to the valid appointment of new trustees." This, however, was always a very doubtful point, and the new act sets the doubt at rest by providing that new trustees may act before the trust property is vested in them; but at the same time it enacts, in sub-sect. 4, that on the appointment of a new trustee any assurance or thing requisite for vesting the trust property in the new trustees shall be done. Note that the corresponding provisions of Lord Cranworth's Act, as to the conveyance of the trust property to the new trustees, &c., only applied to the appointment of new trustees made in pursuance of that statute, whereas the new act applies to all appointments of new trustees. As to the provision contained in sub-sect. 6, that the enactments of the section relating to a *trustee who is dead* shall include the case of a person nominated in a will dying before the testator, this is also a statutory recognition of judge-made law; for it was held that a trustee who has survived his testator may appoint a new trustee in the place of one who predeceased the testator. (*Re Hadley*.) Supposing, however, a testator appointed A. and B. his trustees, and A. became lunatic during the testator's lifetime, the statutory enactment would seem not to apply to such a case so as to enable B. to appoint a new trustee. (*Vide Newton v. Newton*.) A recent case (*Re John Gibbons' Trusts*) has been decided on sect. 31 of this act. In that case there was a petition by the surviving trustee and the *cestui que trusts* of the testator for the appointment of a new trustee in addition to the surviving trustee, and for a vesting order. The petition was prepared in 1881, but not presented till January, 1882, after this act had come into operation. Kay, J., said that under the circumstances a trustee would be appointed by the court; but in future petitions for the appointment of new trustees ought not to be presented where the power given by the Act of 1881 could be exercised.

We now come to sect. 32, which gives a new and important privilege to trustees. Before this act one of several trustees could not retire from the trust without appointing a successor, except

1. Under a power to that effect specially given by the trust instrument.
2. By the consent of the *cestuis que trustent*, they being *sui juris*.
3. By the authority of the court. (See *Forshaw v. Higginson*; *Wilkinson v. Parry*.)

Now, however, under sect. 32, where there are *more than two* trustees, *one* of them may retire without any new trustee being appointed in his place. The retirement can only take place under the following circumstances :—

- (a) Two trustees must be left to perform the trust ;
- (b) The retiring trustee must declare his desire to be discharged from the trust *by deed* ;
- (c) His co-trustees, *and also* such other person, if any, as is empowered to appoint new trustees, must consent to his discharge, and also to the vesting of the trust estate in the remaining co-trustees alone, *by deed* ;
- (d) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone must be done.

If all these requisites are observed, the retiring trustee shall be deemed to have retired from the trust, and shall be by the deed discharged from the trust without any new trustee being appointed in his stead.

Sect. 32 applies to trusts created *either before or after* the commencement of the act, but only so far as not excluded by the expression of contrary intention in the trust instrument, and subject to the provisions thereof.

Sect. 33 gives to trustees appointed by the Court of Chancery (for it is retrospective), or by the Chancery Division, or any other court of competent jurisdiction (*e. g.* county courts, under 28 & 29 Vict. c. 99), as well before as after the trust property is vested in them, the same powers, authorities and discretions as they would have had if they had been originally appointed in the trust instrument. Observe that this section only applies to trustees appointed *by some court*. The case of trustees appointed otherwise is already provided for in sect. 31. This new section effects an improvement on Lord Cranworth's Act, which provided that every trustee appointed by the Court of Chancery, either before or after the commencement of that act, should have the same powers, &c. as an original trustee (sect. 27) ; but did not provide that they should have such powers, &c. *as well before as after* the trust property was vested in them. The provisions of sect. 27 of Lord Cranworth's Act and the 33rd section of this act were necessary, because it was held that a new trustee appointed by the court could only exercise such of the powers given to the original trustees as were not

arbitrary, or of a specially discretionary nature. (*Doyley v. Att.-Gen.*) Nor could such trustees exercise a power which the author of the trust had given to his trustees *nominatim*. (*Newman v. Warner.*)

We now come to the new provision (before referred to) as to the mode of vesting the trust property in the new trustees. This may be effected by a *declaration* by the appointor in the *deed*, by which the new trustee is appointed, to the effect that *any* estate or interest in the trust property shall vest in the *persons who by virtue of the deed become and are the trustees for performing the trust*. When such a declaration is made, it will operate, without any conveyance or assignment, to vest the trust property in the persons who become the trustees as joint tenants (sect. 34). A few observations on this section are necessary.

1st. The declaration must be made on the appointment of new trustees, and that appointment must be by deed. Under sect. 31, the appointment of new trustees need only be by writing; but under this section, if it is wished to take advantage of the declaration for vesting the trust property in the new trustees, it must be by deed.

2nd. (a) The legal interest in copyhold or customary land;

(b) Land in mortgage to the trustees;

(c) Shares or stocks transferable only in the books kept by a company or other body,

are incapable of being passed by the declaration (sub-sect. 3); so that they must be vested in the trustees in the ordinary way, *i. e.* as to copyholds by actual surrender and admittance, as to mortgages by conveyance of the legal estate, and as to shares, &c. according to the mode of transfer applicable in each particular case.

3rd. The section only applies to deeds of appointment of new trustees executed *after* the commencement of the act (sub-sect. 5).

4th. The use of this declaration is not compulsory, *i. e.* it is still in the power of the appointor to vest the property in the new and continuing trustees by the old method of conveyance to them thereof. In ordinary cases, there seems to be little advantage in using the declaration instead of the usual conveyance or assignment to vest the property in the trustees. But in those cases where it is doubtful who has the legal estate, or the legal estate is vested in an infant or a lunatic or person of unsound mind, or in fact in any

of the cases mentioned in sects. 3 to 18 of the Trustee Act, 1850, in these cases the declaration will prove most beneficial, as it will enable the person appointing new trustees to vest the trust property in them without the inconvenience and expense of applying to the court for a vesting order under that act.

When the deed of appointment operates to transfer the property to the trustees appointed, whether by declaration or actual transfer, it must, it seems, be stamped with a double stamp duty, viz., 10s. for the appointment and 10s. for the transfer, and this notwithstanding sect. 78 of the Stamp Act, 1870. (*Re Hadgett; Re Harrop's Trusts.*)

5th. A declaration is also, by sub-sect. 2, made applicable to the case of a trustee retiring under the 32nd section of this act. Here if the declaration is made by (a) the retiring trustee, and (b) the continuing trustees, and (c) the person, if any, empowered to appoint trustees, then the declaration will operate to vest the trust property (with the exceptions before mentioned) in the *continuing trustees alone* as joint tenants. Here again it would appear that double stamp duty is chargeable.

The above sections of the Conveyancing Act, 1881, are supplemented by sect. 5 of the Act of 1882, which provides that on the appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts, distinct from those relating to any other part or parts of the trust estate; or if only one trustee was originally appointed, then one separate trustee may be appointed for the first mentioned part. This section applies to trusts created either before or after the commencement of the act. Before this act, when the same set of trustees held a trust estate, which was composed of several estates of a different description, or parts of which were held by them upon different trusts, and there was only the usual power of appointment of new trustees, it was not possible to divide the trust by appointing one set of trustees to act with regard to one part of the trust estate, and another set of trustees to act as to the other part. (*Vide Cole v. Wade.*) And the court in one case held that upon a petition to appoint new trustees under the Trustee Act, 1850, it had no jurisdiction to make such an order. (*Re Dennis's Trusts.*)

The result of the section is that there will be in future no difficulty in dividing the trust estate between different sets of trustees.

CHAPTER III.

STRICT SETTLEMENTS.

THE object of a strict settlement is to settle the land *in specie* in such a manner that it may be enjoyed by the intended husband during his life, and at his death may devolve upon his eldest son, and that the estate may thus be kept in the family. At the same time, it has, for further objects, the providing of an income by way of pin-money, for the intended wife during the life of her husband, and of a jointure for her after his death; and also the raising of portions to be paid to the younger children of the marriage. These objects were formerly only to be accomplished by a long and very complicated instrument, and though a strict settlement may now, in consequence of the Conveyancing Acts and of the Settled Land Act, 1882, be very much abbreviated, and is very materially simplified, yet it is an instrument which even at the present day is by no means free from complication, and must necessarily run to a considerable length. Fully to consider all the various provisions of a strict settlement, to explain them, and the reasons for their insertion, and the objects they are intended to effect, would itself occupy a volume of considerable dimensions, and cover more space than could be afforded in a general treatise on conveyancing: so that all we shall attempt to do here will be to give you a general analysis of such a settlement, and to endeavour to put before you some of the points which arise in connection with its limitations, provisions and clauses. We shall then call your attention to some of the leading provisions of the Settled Land Act, 1882, and of the Settled Estates Act, 1877: and for fuller information on the subject we must refer you to some of the standard works which are specially concerned with the subject of settlements.

I. Generally as to the Form of a Strict Settlement.

On reading through an old form of a strict settlement, the first point that will probably strike you is the fact of the number of trustees created and their division into distinct sets. Thus, you will generally find that there are four sets of trustees. You will find two trustees who are to exercise the general powers and trusts of the settlement, two trustees who are to be the trustees of the "pin-money" term, two trustees who are to be the trustees of the "jointure" term, and two more trustees who are to be the trustees of the "portions" term. The idea in having different sets of trustees was, in the first place, that it was thought that as the trustees of the general powers and trusts were more particularly concerned with the interests of the husband and of the eldest son, and as the other trustees were more particularly intrusted with the care of the interests of the wife and of the younger children, these interests were to some extent conflicting, and could not well be intrusted to the same set of persons. Another more satisfactory reason for having several sets of trustees was the danger of a merger occurring, by reason of there being vested in the same persons two or more terms, or a term and an estate of freehold limited in immediate succession. But this danger has been obviated by the 25th section of the Judicature Act, 1873, which, as you will remember, provides that there shall not be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. It is now the practice to have only one set of trustees; but these, as a rule, should always be at least three in number; for otherwise, on the death of one of them, the number will be reduced below two, the minimum number which, as we shall hereafter see, is contemplated by the Settled Land Act, 1882.

The next point which may perhaps attract your notice will be the limitation of terms to secure the wife's pin-money and jointure and the portions for the younger children. You may perhaps ask yourself what are these terms for? Briefly, the object of them is to make it possible to raise money for the requisite purposes without interfering with the freehold of the estate and the enjoyment of it by the tenant for life or owner for the time being. For the insertion of the term has no deteriorating effect upon the

legal seisin of the freeholder, even if it be limited so as to precede his estate. All that it gives to the person to whom the term is limited is the right to the rents and profits of the land during the term. It results, then, that if a term be vested in trustees, and, subject thereto, the estate be given to A. for life, the trustees have the power to take possession of the land during their term, but A. still gets a life estate, and will enjoy all the profits and incidents thereof unless the trustees enter into possession and take the rents and profits, as they are entitled to do, by virtue of the term of years vested in them. This being so, when it is wished, for instance, to make a provision for the payment to the intended wife of an annual sum as pin-money, it is accomplished by preceding the grant of the estate to the intended husband for life by a term for ninety-nine years, which is vested in trustees upon trust out of the rent and profits, or by the sale of timber or minerals, or by mortgage of the premises, or any of them, for all or any part of the term, to raise the annual sum required. The trustees are directed to allow the person or persons for the time being entitled in reversion immediately expectant on the term to the premises to receive the surplus of the rents and profits. Now if the tenant for life takes care that the annual sum is duly paid it will be unnecessary for the trustees to enter into possession of the premises under the term, so that the tenant for life is enabled fully to enjoy the land without disturbance. But should he neglect to see that the annual sum is paid, the trustees can at once enter and make use of their powers as owners of the term to raise it.

It will thus be seen that the employment of these terms is very convenient, leaving as they do the person entitled to the freehold interest in the land the full power to have uninterrupted enjoyment of the land, while at the same time they afford ample security that the sums intended to be secured by them shall be duly paid. It is not now necessary to insert a proviso for the cesser of the term upon the objects for which it was created being satisfied; for, by 8 & 9 Vict. c. 112, every term of years becoming satisfied after the 31st December, 1845, will, immediately on becoming attendant upon the inheritance, absolutely cease and determine.

We now proceed to set out an analysis of the usual limitations and clauses and provisions of a strict settlement, as it would have been framed prior to the coming into operation of the Convey-

ancing Acts, of the Married Women's Property Act, 1882, and of the Settled Land Act, 1882; and we will, in the course of our remarks upon it, point out which clauses, &c. have been affected, and which have been rendered unnecessary by those enactments.

Presuming (as will be the case under most circumstances) that the property which is to be settled comes from the intended husband, and that he is seised in fee, the first limitation in the settlement will be to the trustees and their heirs, to the use of the husband and his heirs until the intended marriage. Upon this limitation we need offer no additional remarks to those which we have made in a previous page with regard to the corresponding limitation in a settlement of personalty. (*Ante*, p. 330.) We may, however, just remind you that, in describing the parcels, the general words and the "all the estate clause" can now be omitted in view of the provisions of the Conveyancing Act, 1881, and that also, in pursuance of the same act, the "heirs" of the trustees need not be specified, but the conveyance can be made to them "in fee simple."

After the solemnization of the marriage, the trustees will hold the property to the use of the trustees for ninety-nine years (the pin-money term); then to the use of the husband for life; then to the use that the wife shall receive an annuity for her jointure; then to the use of the trustees for 200 years (the jointure term); then to the use of the trustees for 1,000 years (the portions term); then to the use of the sons of the marriage successively in tail male; then to the use of the daughters of the marriage as tenants in common in tail, with cross-remainders between them; and finally, to the use of the intended husband, his heirs and assigns for ever. Following these limitations come the declaration of the trusts upon which the pin-money, the jointure, and the portions terms respectively, are to be held, and then would follow the various powers which were intended to be exercised by the tenant for life, such as powers to jointure a future wife, to charge portions for the children of a future marriage, to lease and sell, and, where necessary, to enfranchise, and to grant licences to copyholders. Then there would be a trustees' receipt clause, a power to appoint new trustees, a trustees' indemnity and reimbursement clause, and the settlement would conclude with the settlor's covenants for title.

II. The Pin-Money Provision.

We will now examine these provisions somewhat more in detail.

First, as to the pin-money term. The object of this is, as we have already mentioned, to provide an income for the wife during the joint lives of herself and her husband for her private expenses. As the charge which it is meant to secure is payable during the life of the husband, this term is limited so as to take effect prior to his life estate; so that he only holds that estate subject to the term. The consequence is, that if the annuity is not paid to the wife, the trustees can enter under their term during his lifetime and raise the money charged. The trusts of this term are declared to be to raise an annuity of a specified amount during the joint lives of the husband and wife, and to pay it to the wife as pin-money, and without power of anticipation. It was formerly the practice to state that this annuity was to be deemed "accruing from day to day." But the necessity of expressly stating that it should be so payable was done away with by the Apportionment Act, 1870, which, as you will remember, provides that, *inter alia*, all annuities and other periodical payments in the nature of income shall, like interest on money lent, be considered as accruing from day to day, and be apportionable in respect of time accordingly.

In future, instead of limiting a term to trustees to secure the payment of the pin-money, it will probably become the practice to give the wife a rent-charge during the joint lives of herself and her husband, annexing to it a proviso restraining anticipation. For in the limiting of such a charge there is involved much less complication than in the limiting of a term according to the old practice; and since the Conveyancing Act, 1881, the grantee of a rent-charge is endowed with ample powers for procuring the payment of the charge, and these powers need not be expressly set out in the settlement. For by sect. 44 of that act it is provided, that any person entitled under an instrument coming into operation after 1881 to receive any annual sum out of land, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion, shall have, subject to all prior interests, a power to distrain on the land for the charge, whenever it is in

arrear for twenty-one days; and if the sum is in arrear for forty days, then (although no legal demand has been made for payment) such person may enter into possession of the land and take the income thereof until thereby or otherwise the annual sum and all the arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment, are fully paid; and such possession when taken will be without impeachment of waste.

The same section gives the further power, when the annual sum is forty days in arrear, whether taking possession or not, by deed to demise the land charged or any part thereof to trustees for a term of years, with or without impeachment of waste, upon trust (a) by mortgage; (b) by sale; (c) by demise for all or any part of the term; or (d) by receipt of the income of the land; or (e) by all or any of the above means; or (f) by *any other* reasonable means, to raise and pay the annual sum and arrears and the costs and expenses incurred by the non-payment thereof (including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed).

The trustee of a term created under this last-mentioned power could require tenants, under leases made before the date of the settlement, to pay their rents to him, as being the assignee of the reversion expectant on the determination of their leases; and as to holders of leases granted since the settlement, he could require them to pay their rents to him, as being the reversioner expectant on the determination of their terms. It results, then, that a settlement can be very materially simplified and shortened by securing the pin-money by a rent-charge, as you will then be able to dispense with a pin-money term, and you need not insert any express powers of distress and entry.

III. The Life Estate of the Settlor.

With reference to the life estate given to the husband we shall see, when we come to consider the provisions of the Settled Land Act, 1882, what extensive powers of dealing with the property that act confers on him. The estate of the husband is usually given to him "without impeachment of waste." This will enable

him to commit all kinds of waste, except such as a court of equity would restrain. (See Judicature Act, 1873, s. 25.) If the husband as tenant for life is left impeachable for waste, he will not be at liberty to cut down timber, except for the repair of houses or fences, and implements of husbandry; and if he wrongfully cuts down timber the produce will be directed to be invested and accumulated for the benefit of the first estate of inheritance. But now, under sect. 35 of the Settled Land Act, 1882, even when impeachable for waste, he may cut timber ripe and fit for cutting and sell the same; but he must first obtain the consent of the trustees or the leave of the court, and three-fourths of the net proceeds of the sale will have to be set aside as "capital money" under the act, and the other fourth goes as rents and profits. If, however, the tenant for life is "without impeachment for waste" he may, irrespective of the Settled Land Act, 1882, cut down timber (except ornamental timber) and convert it to his own use. As to the working of mines, he may not, if impeachable for waste, open new mines, but he may work open ones. Special provisions allowing him to make mining leases are conferred by the Settled Land Act. These will be referred to later on. He is generally not liable for mere permissive waste, *e.g.*, the allowing of the premises to fall into disrepair, unless he has expressly contracted to keep them in repair. (See *Woodhouse v. Walker*.) So that if it is the intention that he should keep the premises in repair, a clause to that effect should be contained in the settlement. As to the general rights of a tenant for life to commit waste you should consult the leading case, *Lewis Boules' Case*.

IV. The Jointure Provision.

After the life estate to the husband comes the limitation to the wife of an annuity secured by powers of entry and distress for her jointure. This was expressed to be in bar of her dower or freebench, and the power of distress was given to her in the event of the jointure being in arrear for twenty-one days, and a power of entry was conferred in the event of its being in arrear for forty days. You will observe that the jointure was secured collaterally by a term vested in the trustees, which was limited so as to come into effect after the husband's life estate, as the jointure would not

require to be raised till that estate had determined by his death. The reason for giving this additional security was, that the power of distress could not be exercised over lands which were in the occupation of persons holding under leases created before the settlement, or created subsequently under powers to grant leases contained in the settlement; for the title of such lessees was paramount to the rent-charge. But if a term was vested in trustees, they could require these lessees to pay their rent to them, because a lessee must pay his rent to the legal reversioner, and the trustees would be in that position; for as to leases created prior to the settlement, they would be assignees of the reversion expectant on the determination of them; and as to leases created since then, they would be the reversioners expectant on them.

But, as we saw was the case with the pin-money term, so with the jointure term, it will in future be unnecessary to make use of it, in consequence of the powers given to the grantees of rent-charges by the 44th section of the Conveyancing Act, 1881; and, by virtue of the same section, it will further be unnecessary in future to insert express powers of distress and re-entry. (See *ante*, p. 359.)

V. Portions for the younger Children.

Following the jointure term comes the term for securing the portions for the younger children of the marriage. This term is usually a long period of years, in most cases consisting of 1,000 years. It will still be necessary to make use of this method of securing portions. For these are not, like pin-money and jointure, mere annuities; but they are "lump sums" of money payable to the children of the marriage upon their attaining a certain age. You will at once see that a mere rent-charge, with its attendant powers of distress, entry, and power to create and deal with a term, would not in this case answer the purposes required. The money required to discharge the portions will be, as a rule, most conveniently raised by mortgage, and it is with this object that the term is given to the trustees, and for this reason that it is made of so great a length; for it is evident that a short term would not constitute a good mortgage security, and would not encourage persons to advance money on the mortgage of it. Notice, also,

that the portion term follows the life estate given to the intended husband, and precedes the estate in tail limited to the eldest son of the marriage. The result of this is that the eldest son takes his estate tail subject to the portions to the younger children, and accordingly he cannot, by disentailing his estate, get rid of the charge of the portions, since they are prior to that estate. In a subsequent part of the settlement it is provided that the land settled shall stand charged with a certain sum (reducible as thereafter provided) for the portions of the children, who, being younger sons, shall attain the age of twenty-one, or, being daughters, shall attain that age or marry under that age. Then the meaning of the term "younger sons" is defined, so as to include every son not being at his birth, or becoming during his minority, an eldest or only son entitled for the time being under the settlement to an estate tail in the premises in possession or remainder immediately expectant on the decease of the tenant for life. Then it is provided that the portion money shall be divided among the children in such shares as the intended husband shall by deed or will appoint, and in default of appointment among them in equal shares, the portion of each child who attains a vested interest therein after the death of the tenant for life to be payable on the vesting thereof, and the portion of each child who attains a vested interest during the lifetime of the tenant for life to be payable on the decease of the tenant for life. It is then provided that any child who has his portion appointed to him shall not be entitled to any share in the unappointed part, without bringing such share into hotchpot.

Then follow provisions for the reduction of the original amount of the charge. It is generally stipulated that if only one child, being a younger son, shall attain twenty-one years, such child shall have only a smaller sum as a portion than the sum originally specified as the total amount of the portion fund; and if two children and no more shall attain twenty-one, then the portion fund which they will share is also reduced from the original amount, but is made larger in amount than that which is to be paid in case there is only one child. Then with regard to the excess of the original sum over the amounts payable respectively, when there is only one or two younger children to share the portions, it is provided that it shall sink into the hereditaments and cease to be charged thereon.

The trusts of the portions term are declared to be, that the

trustees shall by mortgage thereof, or by or out of the rents and profits thereof, or by any other reasonable ways and means, raise the money to which any child or children shall become entitled for a portion as and when the same becomes payable, with the costs and expenses of the execution of the trust; and further, that so long as any portion which has become payable remains unpaid, that the trustees shall out of the rents and profits of the hereditaments, or by any other reasonable ways or means, raise interest thereon; and further, that if at the decease of the intended husband, any child entitled in expectancy to a portion is under the age of twenty-one, and, being a daughter, is unmarried, the trustees shall, with and out of the profits of the hereditaments, or by any other reasonable ways or means, raise such annual sum for the maintenance and education of each such minor, as they think fit; and further that, subject to the above trusts, and to the power of advancement next hereinafter contained, the trustees shall permit the rents and profits of the hereditaments to be received by the person for the time being entitled thereto in remainder immediately expectant on the term. Then the trustees are empowered to raise a moiety of the presumptive shares of the sons, for their advancement, preferment or benefit, at the request of the intended husband during his life, and after his decease, at their own discretion, the money so raised to be reckoned as part of the share of such son, if he should attain the age of twenty-one.

The first point which may strike you in connection with the above provisions, is the question, who is to be deemed a younger son? The object in giving the portions is, of course, to provide for those children of the marriage who do not get any interest in the land itself, and who would thus be otherwise unprovided for. It is not the intention to give the son who takes the land a portion as well as the estate. But it may happen that one who is literally a younger son at the time when younger sons become entitled to portions, may by the death of his elder brother become entitled to step into that brother's shoes, and take his interest in the land. Is he in such a case to be entitled to a portion as well? Evidently this is not the intention, and the general rule is, that in a provision for the raising of portions, when it is made by a parent or person standing *in loco parentis*, the term "a younger child" does not bear its literal meaning, but means the children exclusive of the one who takes the family estate. To avoid any difficulties in this

respect, it is usual in the settlement to define the children who are to be entitled to portions, and these are generally stated to be the children of the intended marriage, "other than an eldest or an only son, for the time being entitled, under the settlement, to an estate tail in possession, or in remainder, expectant on the death of the tenant for life." But even with a clause of so explicit a nature difficulties occur. If an eldest son dies without issue before the time when the portions become distributable, the second son will then become the eldest son, and as he then gets the settled estates, he will be excluded from a share in the portions. (See *Re Bayley's Settlement*.) But it has been held, that if the eldest son has before his death executed a disentailing deed which prevents the second son from taking the settled estate, that second son will not be excluded from a share in the portions, even though he may take the property under a re-settlement. (See *Macoubrey v. Jones*.) And in *Ellison v. Thomas* it was decided, that if an eldest son dies before his estate tail fall into possession, without leaving inheritable issue, and without his having disentailed, his representatives will, under the description of younger children, or rather as the representatives of a younger child, take a share in the portions. The question is in these cases, When is the character of a "younger son" to be ascertained? This should be fixed by the settlement, and it is advisable to provide that the character shall be deemed ascertained at the time the son attains twenty-one, and so becomes entitled to a vested share in his portion. The result will be that an eldest son, on attaining twenty-one, will be excluded from a portion in every case, while a second son, who is still a younger son when he attains twenty-one, will not be deprived of his portion by the subsequent death of his elder brother. This plan will enable a second son, should he marry during his elder brother's lifetime, to make a certain provision for his wife and children, and one which is not liable to be defeated by the loss of his portion in consequence of his afterwards becoming an eldest son. If the settlement is silent on the point, the period of distribution, not that of vesting, will be the time for ascertaining the character. Thus, where A. bequeathed funds to B. for life, and after his death to his children, except an eldest son, it was held the period for ascertaining who was an eldest son was the period of distribution, not A.'s death. (*Matthews v. Paul*.)

You will notice that the time for payment of the portions is not

until after the death of the intended husband, although the children may obtain vested interests therein during his lifetime. Sometimes power is given to the father (the tenant for life) to require the portions to be raised and paid during his lifetime. Sometimes, too, an express power is given to the owner of the estate for the time being to have the total sum designated as the portion fund to be raised as soon as the first portion becomes payable, so that the trustees need not be obliged to make as many mortgages of the term as there are portions. It is doubtful if, in the absence of express provision, the whole of the portions could be raised at once. (See *Sheppard v. Wilson*.)

As to when portions charged on land and payable on certain events are or are not to be raised should the person die before the event happen, you must refer to the leading case of *Paullett v. Paullett*. The general rule is, that if the event be personal to the person to be benefited, *e.g.* on his attaining twenty-one, and he die before the event happen, the portion is not to be raised out of the land; but if the payment is postponed to the happening of an event not referable to the person to be benefited, but to the circumstances of the estate out of which the portion is to be raised, it will be raiseable after the death of the tenant for life, though the term out of which it was to be raised had not arisen during the life of the person to be benefited owing to his death during the life of the tenant for life. (*Evans v. Scott*.)

VI. The Uses in strict Settlement.

With reference to the estate tail conferred on the eldest and other sons successively, you will remember that it is not now necessary to use the words "heirs of the body," but that the estate can be limited to such son and sons under the expression "in fee tail." (Conveyancing Act, 1881, s. 51.) Further, though the estate of the tenant in tail under the settlement is a contingent remainder, and formerly it would have been necessary to have had trustees to support such contingent remainder, this is now no longer necessary, as, by 40 & 41 Vict. c. 33, every contingent remainder created by any instrument executed after that act which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, will, if the particular estate determines before the remainder vests, be capable of taking effect

just as if it had originally been created as a springing or shifting use, &c.

The estate tail to the daughters you will observe is given to them with "cross remainders between them." This needs some explanation. The limitation in full runs as follows:—"To the use of the daughters and the heirs of their respective bodies in equal shares as tenants in common. And if and so often as there shall be a failure of issue of such daughter, then as well as to her original share as also to the share or shares which shall have accrued to her or the heirs of her body by this present limitation, to the use of the others of such daughters and the heirs of their respective bodies in equal shares as tenants in common. And if there shall be a failure of issue of all such daughters but one, or if there shall be but one such daughter, then as to the entirety of the premises to the use of such one or only daughter and the heirs of her body." The effect of this limitation is that on the death of any daughter and the failure of the issue of her body both her original share and any share which she or her issue may have taken will be divided equally among the other daughters in tail.

For the provisions of the powers to jointure a future wife, and to charge portions for the children of a future marriage, we must refer you to some book of Precedents.

VII. Trustee Clauses.

Before 1882 it was generally the practice to give the trustees, during the minority of an infant tenant for life, or tenant in tail *by purchase* (*i. e.* one taking immediately under the settlement, and not through some person who took under the settlement), power to enter upon the estate and to manage it, such power directing them to pay all outgoings and moneys necessary for the maintenance of the infant, and to accumulate the residue of the income for the infant's benefit, should he attain the age of twenty-one. The object in restricting the trust for accumulation to the minorities of infant tenants in tail *by purchase* was, that, if it was framed so as to include tenants in tail in general, it would be void as infringing the perpetuity rule. But under a trust for a tenant in tail *by purchase*, the *cestui que trust* will be one who takes by the direct limitation in the settlement, and accordingly must attain twenty-one within the life in being and twenty-one years after. Accumu-

lation is, as you are aware, further restricted by the Thellusson Act (39 & 40 Geo. 3, c. 98), to one of the following periods:—The life of the settlor; the term of twenty-one years from his death; during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of the settlor; during the minority or respective minorities of any person or persons who, if of full age, would be entitled to the rents and income directed to be accumulated. Under this statute a trust for accumulation which offends against the perpetuity rule will be void altogether (*Boughton v. James*); but if it is within that rule, and only exceeds one of the periods allowed by the statute, it will only be void *pro tanto* (*Griffiths v. Vere*). In *Longden v. Simson* accumulation was directed until legatees not then born attained twenty-one, and it was held that the direction to accumulate was good for twenty-one years only from the testator's death. These management and accumulation clauses may now, however, be omitted in reliance on sect. 42 of the Conveyancing Act, 1881, which enables the following persons to enter into and continue in possession of the infant's land:—The trustees, if any, appointed *for the purpose* by the settlement; if no such trustees are appointed, then the trustees with power of sale of the settled land, or with power of consent to or approval of the exercise of such power of sale; or, if none, then any persons appointed as trustee for this purpose by the Court on the application of the guardian or next friend of the infant.

The powers of a trustee who has entered are as follows:—

1. To manage or superintend the management of the land.
2. To fell timber or cut underwood from time to time in the usual course, for sale or for repairs or otherwise.
3. To erect, pull down, rebuild and repair houses and other buildings and erections.
4. To continue the working of mines which have usually been worked.
5. To drain or otherwise improve the land, or any part thereof.
6. To insure against loss by fire.
7. To make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies.
8. Generally to deal with the land in a proper and due course of management; but so that where the infant is impeachable for waste the trustees shall not commit waste, and shall cut timber on

the same terms only and subject to the same restrictions on and subject to which the infant could if of full age cut the same.

9. Out of the income of the land (including the produce of the sale of timber and underwood), to pay the expenses of management and all outgoings not payable by any tenant or other person, and to keep down any annual sum and the interest of any principal sum charged on the land.

10. Power to apply at their discretion any income which they deem proper for the infant's maintenance, education or benefit.

11. To invest the residue in the securities authorized by the settlement or by law, with power to vary investments, and to accumulate the income of the investments at compound interest, and stand possessed of the accumulated income on the trusts following, *i.e.*:

- (a) If the infant attains twenty-one years, then in trust for the infant;
- (b) If the infant is a woman and marries while an infant, then in trust for her separate use;
- (c) If the infant dies while an infant, and, being a woman without having been married, then where the infant was, under a settlement, a *tenant for life*, or *by purchase tenant in tail*, upon the trusts, if any, declared of the accumulated fund in the settlement; and where no such trusts are declared, or the infant has taken the land *by descent* and not by purchase, or is a *tenant in fee simple* of the land, then in trust for the infant's *personal representatives as personal estate*.

By sub-sect. 6, it is provided that where the infant's estate or interest is in an *undivided share in land*, the trustees may exercise the powers given by the section jointly with persons entitled to the other undivided share or shares. This empowers trustees to manage the estate of an infant where it consists only of an undivided share in land, *e.g.*, where the infant is one of a class.

These powers apply when the instrument under which the infant's interest arises comes into operation after the commencement of the act, *i.e.*, after the 31st December, 1881, and may be excluded or varied by the instrument. (See *Re Duke of Newcastle*.)

As to the power to lease, this need not now be expressly inserted in the settlement; for, as we shall see, the tenant for life has

sufficient powers for that purpose conferred on him both by the Settled Estates Act, 1877, and the Settled Land Act, 1882. The power to grant licences to copyholders may also now be omitted in reliance on sect. 14 of the Settled Land Act, 1882. The power to enfranchise copyholds, to sell and exchange, may also be omitted in consequence of the same act (sect. 3 (ii)); and the general powers of sale, &c., given under certain circumstances by the act to the tenant for life, may be in future relied on. (See *post*, p. 376.) Of the receipt clause, the trustees' indemnity and reimbursement clauses, as well as of the covenants for title by the settlor, we have already spoken.

VIII. The Settled Land Act, 1882, as amended by the Settled Land Act, 1884.

This act does not repeal the Settled Estates Act, 1877 (with the exception of sect. 17 thereof), but it practically supersedes it, so that it will be convenient to consider the provisions of the Settled Land Act first. The first point you must attend to is the definitions contained in the second section of the act. Drawing your attention to the most important of these, we observe that a "settlement" will include not only what is generally understood by a marriage settlement, but any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, act of parliament, or other instrument, or any number of instruments, made or passed before or after, or partly before and partly after the act, under or by virtue of which land or any estate or interest therein is limited to or in trust for any persons by way of succession. And an estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is a settled estate under the Settled Land Act; and any estate or interest therein which is the subject of a settlement is "settled land."

(a) *Who is a Tenant for Life within the meaning of the Act.*

The act defines a tenant for life as a person who is for the time being under a settlement beneficially entitled to possession of the settled land for his life, and provides that, if there are two or more persons so entitled as tenants in common or joint tenants or for concurrent interests, they together constitute the tenant for life; and further, such person or persons will remain tenant or tenants for life, notwithstanding that the settled land is encumbered or

charged in any manner or to any extent. When two or more persons constitute together the complex tenant for life the consent of one, when consent is required by the act, will be sufficient (Settled Land Act, 1884, s. 6 (2)), but subject to this exception the powers conferred by the act must be exercised by the complex tenant for life. Now the act gives certain powers to a tenant for life, and in sect. 58 it provides that each of the following persons shall, when their estates or interests are in possession, have the powers of a tenant for life under the act, just as if they were tenants for life defined thereby.

- (i.) A tenant in tail, including a tenant in tail who is by act of parliament restrained from barring or defeating his estate tail, and although the reversion is in the crown, and so that the exercise by him of his powers under this act shall bind the crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by parliament in consideration of public services. (Note that under the 55th section of the Settled Estates Act, 1877, a tenant in tail so restrained by any act of parliament was debarred from applying for an order for sale under that act.)
- (ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event :
- (iii.) A person entitled to a base fee, although the reversion is in the crown, and so that the exercise by him of his powers under this act shall bind the crown :
- (iv.) A tenant for years determinable on life, not holding merely under a lease at a rent (see *Hazle's Settled Estates, In re*):
- (v.) A tenant for the life of another, not holding merely under a lease at a rent :
- (vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose :

- (vii.) A tenant in tail after possibility of issue extinct :
- (viii.) A tenant by the curtesy (as to the estate of a tenant by the curtesy, the Settled Land Act, 1884, provides that it shall be deemed an estate arising under a settlement made by his wife) :
- (ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event. (Under this sub-section it has been held that where lands were demised to trustees for A. for life, but on certain trusts, *i. e.*, to keep down interest, pay an annuity, manage the estate, &c., the balance only going to A., with remainders over on his death, and the whole of the income was exhausted by the expenses, &c., A. was still a tenant for life though he had no actual beneficial interest, and could exercise the powers given to tenants for life. *Re Jones' Estate*.) Note lastly, that while a tenant *in dower* is expressly referred to in the Settled Estates Act, 1877, there is no reference to such a tenant in the Settled Land Acts, 1882 or 1884.

Besides this, sect. 59 provides that where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this act the land is settled land, and the infant shall be deemed tenant for life thereof.

With regard to the exercise of the powers conferred on the tenant for life, the act makes special provisions to meet the several cases of the tenant for life being an infant, a married woman, or a lunatic. These provisions are as follows:—

Where a tenant for life, or a person having the powers of a tenant for life under this act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this act, the powers of a tenant for life under this act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders. (Sect. 60.)

With regard to married women it is provided, by sect. 61, as follows:—

(1.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this act.

(2.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this act.

(3.) The provisions of this act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together.

(4.) The married woman may execute all deeds and do all things necessary to give effect to the provisions of the section.

(5.) A restraint on anticipation in the settlement is not to prevent the exercise by her of any power under the act.

By sect. 62, where a tenant for life, or a person having the powers of a tenant for life under this act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate. Notice must be given to the trustees. (*Re Taylor.*)

The next important definition is that of the persons who are to be deemed trustees under the act. These persons the act defines as the persons, if any, who are for the time being, under a settlement, trustees with power of sale of the settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this act, are, for purposes of this act, trustees of the settlement.

The same section then proceeds to define land, rent, building purposes, mines, manors, stewards, wills, securities, &c., but these

definitions are not of so much importance as the foregoing, and we must refer you to the act itself for them.

(b) *The Powers of a Tenant for Life under the Act.*

Next we are to inquire what powers are given by the act to tenants for life. These are powers to sell, to enfranchise, to exchange, to make partitions, to transfer encumbrances of the land sold to other parts of the settled land, to grant leases, to surrender and grant new leases, to grant licences to copyholders to lease, to dedicate land for streets and open spaces, &c., to make certain improvements on the land, to enter into contracts to lease, sell, exchange, make partitions, mortgage or charge, &c., to sell timber in certain cases, &c.

Let us, in the first place, consider the general provisions of the act as to these powers. Sect. 50 enacts that they are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement; so that neither a purchaser of the life estate nor the trustee in bankruptcy of the tenant for life could exercise the powers. (See *Mansel's Settled Estates, In re.*)

(2.) A contract by a tenant for life not to exercise any of his powers under this act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this act.

(4.) This section extends to assignments made or coming into operation before or after, and to acts done before or after the commencement of this act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

Sect. 51 prevents the powers of the act being prohibited, &c.

It enacts that (1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this act a provision is inserted purporting or attempting, by way of direction, declaration or otherwise, to forbid a tenant for life to exercise any power under this act, or attempting or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

By sect. 52, notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this act shall not occasion a forfeiture. And by sect. 53, a tenant for life in exercising any power under this act, is to have regard to the interests of all parties entitled under the settlement, and shall in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

Sect. 54 provides that on a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life, shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could be reasonably obtained by the tenant for life, and to have complied with all the requisitions of the act.

Sect. 55 provides that where a tenant for life or the trustees of the settlement exercise the various powers given to them by the act, they may execute, make and do all deeds, instruments and things necessary or proper in that behalf.

Sect. 56 provides that nothing in the act shall take away, abridge or prejudicially affect any power for the time being subsisting under a settlement or by statute or otherwise, exerciseable by a tenant for life or by trustees with his consent or on his request or by his direction or otherwise; and that the powers given by the act are cumulative; but in case there is any conflict between the provisions of a settlement and those of the act as to such powers, the provisions of the act are to prevail; so that, notwithstanding anything in the settlement, the consent of the tenant for life will be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement, exerciseable for any purpose provided by the act. (By the Settled Land Act, 1884 (s. 6, subs. 2), it is provided, that where several persons form together the complex tenant for life, the consent of any one of those persons to the exercise of any power by the trustees of the settlement shall be sufficient.) The court, on the application of the trustees or the tenant for life, is empowered to give its decision, opinion, advice or direction if any question arises, or doubt is entertained, respecting any matter within the section.

By sect. 57 nothing in the act is to preclude a settlor from conferring on the tenant for life, or the trustees, any powers additional to, or larger than, those conferred by the act; and any such powers so conferred will, in spite of the act, operate and be exerciseable just as if they were conferred by the act, unless a contrary intention is expressed in the settlement.

Let us now glance at the particular powers conferred by the act more in detail. First as to the power given to the tenant for life, in spite of his being merely a limited owner, to sell the fee in the land, or to exchange or make a partition of it.

Sect. 3 provides that the tenant for life may sell the settled land or any part thereof; may sell the seignory of a manor or the freehold or inheritance of any copyhold land, reserving the minerals or not, so as in every such case to effect an enfranchisement; may make an exchange of the settled land or any part thereof; but he must not exchange settled land in England for land out of England. Where the settlement comprises an undivided share in land, or the land has come to be held in undivided shares, he may concur in making a partition of the entirety.

(c) *Restrictions on the exercise of the Statutory Powers.*

But these powers of sale, &c. are not to be exercised without restriction. In the first place, the mansion house on the settled land and the demesnes thereof, and lands usually occupied therewith, may not be sold (or leased) without the consent of the trustees or by an order of the court. Again, before exercising his power to sell (and also before exercising his powers to exchange, make a partition, mortgage, charge or lease), the tenant for life must give notice of his intention so to do to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last-known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage or charge, or of a contract for the same.

(2) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

It was held that the notice referred to must be notice of a specific sale or lease, and not a mere general notice that he intends at some time or other to exercise his powers. (*Ray's Settled Estates*.) But by sect. 5 of the Settled Land Act, 1884, the notice may be a general notice: provided, however, that on the request of the trustees the tenant for life must from time to time furnish particulars as to any sales, exchanges, partitions or leases, either carried out or in progress, or immediately intended. But the trustee may, in writing, waive notice in any particular case or generally, or may accept less than a month's notice. This section applies to notices given before the act as well as those given after, unless such first-mentioned notice has been objected to before the act. The Act of 1884 does not in express terms allow the notice.

to the solicitor of the trustees to be dispensed with or shortened; but as the trustees can dispense with or shorten the notice to themselves, they can, it would appear, dispense, &c. also with notice to their solicitor. And the act does not apply to the case of a mortgage by the tenant for life. You will observe that the number of trustees to whom the notice is to be given must at least be two. Suppose there are not two trustees at the time the tenant for life wishes to exercise his power to sell, &c.; in this case he must apply to the court under sect. 38 of the act to appoint the requisite number of trustees, and the sale will be restrained until such appointment has been obtained and the proper notice has been given. (See *Wheelwright v. Walker*.)

Nor must it be supposed, when the land has been sold, that the tenant for life will be absolutely entitled to the money paid therefor; for the consideration received will constitute "capital money," and will have to be paid to the trustees or into Court, and it will then be dealt with in the manner which the act directs capital money to be dealt with. (See *post*, p. 387.)

(d) *As to Sales, Enfranchisements, Exchanges and Partitions.*

The 4th section contains the following regulations as to sales, enfranchisements, exchanges and partitions:—

(1.) Every sale shall be made at the best price that can reasonably be obtained.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law

permits, by covenant, condition or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a regrant of any right of common or other right, easement or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England. England here includes Wales and Berwick-on-Tweed (see 20 Geo. 2, c. 42, s. 3).

Sect. 5 proceeds to provide, that where on a sale, exchange or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, *with the consent of the incumbrancer*, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

If the land sold is an undivided share in land, the tenant for life of that undivided share may join or concur with any person entitled to or having a power or right of disposition of or over another undivided share (sect. 19); and by sect. 20 the tenant for life may give effect to any sale, exchange, partition, lease, mortgage or charge he may make under the act by conveying or creating the same by deed; and such deed will pass the land conveyed, or the interest created, discharged from all the limitations, powers and provisoes of the settlement, and from all estates, interests and charges subsisting or to arise thereunder, subject to and with the exception of (i) estates, interests and charges having priority to the settlement; (ii) estates, &c. which have been conveyed or created for securing money actually raised at the date of the deed; and (iii) leases, grants at fee farm rents or otherwise, and grants of easements, rights of common, or other rights and privileges granted or made for value in money or money's worth, or agreed so to be before the date of the deed by the tenant for life, or any of his predecessors in title, or by any trustees for him or them under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life. With regard to copyholds, the steward is required to enrol the deed when

produced to him, but he may require to be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed, and if he thinks fit he may enter the same on the rolls. Further, these sales, exchanges and partitions, and also a mining lease, may be made, as to land, with or without a reservation or exception of mines and minerals, and as to mines and minerals alone. (Sect. 17.) From this it will be seen that the tenant for life may convey the whole interest, the subject of the settlement, without the concurrence of the trustees or of the remainderman.

Lastly, by sect. 31 the tenant for life may contract to make any sale, exchange, partition, mortgage, or charge, and rescind or vary such contract when made, just as if he were the absolute owner of the land, except that the contract as varied must be in conformity with the act. Any consideration paid to him for varying or rescinding a contract will constitute capital money under the act. He may also contract to make a lease, and in making the lease may vary the terms, so that the lease be in conformity with the act; and he may accept a surrender of a contract for a lease, and make a new or other contract for a lease in like manner and on the like terms in and on which he might make a new or other lease where a lease had been granted. He may also generally enter into any contract to do any act for carrying into effect any of the purposes of the act, and may vary or rescind the same. Every such contract will bind and be for the benefit of the settled land, and will be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by such successor, but so that it may be varied or rescinded by such successor just as if it had been made by himself. The court may give directions as to the enforcing, carrying into effect, varying, or rescinding any such contract.

(e) *As to Leases, Surrenders, Renewals, &c. of Leases.*

The power of the tenant to lease is not only guarded by the same restrictions as the power to sell is, but sect. 6 imposes further restrictions as to the length of the term for which the lease may be granted, &c. These restrictions and regulations are as follows:—The lease may be granted of the land, or of any easement, right or privilege over the same, for any purpose whatever, whether involving waste or not, for any term not exceeding ninety-nine years

for a building lease, sixty for a mining lease, and twenty-one for any other kind of lease. But—

(1) Every lease must be by deed, and take effect in possession not later than twelve months after its date.

(2) It must reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case. If a fine is taken it becomes "capital money." (Settled Land Act, 1884, s. 4.)

(3) It must contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.

(4) A counterpart of every lease must be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life will be sufficient evidence.

(5) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this act in relation to the lease, will, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated. (Sect. 7.)

In addition to the above regulation, building and mining leases are subject to special provisions. With regard to building leases; the consideration must be the fact of the lessee or some person by whose direction the lease is granted, or some other person having erected or agreeing to erect buildings, either new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed or agreed to execute some improvement authorized by the act for or in connection with building purposes. A peppercorn rent may be made payable during the first five years or any less part of the term. If the land is contracted to be leased in lots, the entire rent to be ultimately payable may be apportioned among the lots in any manner, but no lease is to reserve a rent of less than ten shillings; the total amount of rent reserved must not be less in amount than the amount at which the land as a whole would have to be leased at under the act, and the rent reserved by any lease is not to exceed one-fifth of the full annual value of the land with the building thereon when completed. With regard to mining leases; the rent to be reserved

may be ascertained by or vary according to the acreage worked or the quantity of mineral obtained, made merchantable, carried away or disposed of. A minimum rent may be made payable, and the tenant for life may allow the lessee, in case he cannot pay it, to make up the deficiency in any subsequent period, free of any further rent than the minimum rent. And a mining lease may be made in consideration of the lessee's undertaking to execute, or having already executed, some improvement authorized by the act in connection with mining purposes. (See sect. 25 as to these improvements.) A certain portion of the rent arising from these leases must be set aside, and that, whether the mines are already opened or not. Where the tenant for life is impeachable for waste for minerals, three-quarters of the rent must be set aside as capital-money under the act; if he is not so impeachable, then only one-quarter, and the remainder in both cases goes to the tenant for life as rents and profits. And lastly, the court may vary the terms and conditions in building and mining leases where it is the local custom to grant leases different from those authorized by the act, and may allow the custom to be followed, when more beneficial to all parties concerned.

The leasing powers given to tenants for life extends to the three following cases. He may carry into effect a contract for a lease entered into by his predecessor in title, he may renew leases, and he may confirm them.

Provision is also made for his surrendering and granting new leases.

These provisions are as follows :—

(1) He may accept, with or without consideration, a surrender of any lease of settled land, whether made under this act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

(2) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3) On a surrender, he may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5) On a surrender, and the making of a new or other lease, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6) Every new or other lease shall be in conformity with this act. (Sect. 13.)

By section 14 of the act the tenant for life may grant to copyholders licences to lease in the same manner as the tenant for life himself is empowered to do under the act, and so enable the copyholders to make leases binding on the remainderman. The licence may fix the annual value whereon fines, fees or other customary payments are to be assessed, or the amount of those fines, fees or payments. The licence is to be entered on the court rolls, and the steward's certificate will be evidence of such entry.

(f) *As to Mortgages.*

The act empowers the tenant for life to make a mortgage, but in two cases only; (1) where money is required for an enfranchisement, or (2) for equality of exchange or partition, and any money so raised on mortgage is to be considered capital money.

(g) *Other Powers.*

Other powers which are given to the tenant for life are powers to dedicate land for streets and open spaces, and to effect improvements on the estate. The power to dedicate for streets, &c. is contained in section 16, which provides that in connection with a sale or grant for building purposes, or a building lease, the tenant for life for the general benefit of the residents in the settled land may require or cause any parts thereof to be laid out in streets, &c. for the use gratuitously or on payment by the public or of individuals, with all works necessary in connection therewith; and may provide that such part shall be vested in the trustee of the settlement or other trustees, or in any company or public body, and may execute all deeds necessary to give effect to the provisions of the section.

(h) *The Improvements allowed by the Act.*

As to improvements; these are defined by section 25 to be the making or execution on, or in connection with, and for the benefit of, settled land, of any of the following works:

- (i.) Drainage, including the straightening, widening or deepening of drains, streams and watercourses:
- (ii.) Irrigation; warping:
- (iii.) Drains, &c. for supply and distribution of sewage as manure:
- (iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:
- (v.) Groynes; sea walls; defences against water:
- (vi.) Inclosing; straightening of fences; re-division of fields:
- (vii.) Reclamation; dry warping:
- (viii.) Farm roads; private roads; roads or streets in villages or towns:
- (ix.) Clearing; trenching; planting:
- (x.) Cottages for labourers, &c. employed on the settled land or not;
- (xi.) Farmhouses and other buildings for farm purposes:
- (xii.) Saw and other mills, water-wheels, engine-houses and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:
- (xiii.) Reservoirs, &c. for supply and distribution of water for agricultural, manufacturing or other purposes, or for domestic or other consumption:
- (xiv.) Tramways; railways; canals; docks:
- (xv.) Jetties, piers and landing places on rivers, lakes, the sea or tidal waters, for facilitating transport of persons and things required for agricultural purposes, and of minerals, and of things required for mining purposes:
- (xvi.) Markets and market-places:
- (xvii.) Streets, squares, gardens or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land:

- (xviii.) Sewers and other works necessary or proper in connection with any of the objects aforesaid :
- (xix.) Preliminary works necessary or proper in connection with development of mines :
- (xx.) Reconstruction, enlargement or improvement of any of those works.

Sects. 27, 28 and 29 relate to the subject of improvements, and provide, that where the tenant for life desires capital money arising under this act to be applied towards improvements authorized by the act, he may submit for approval to the trustees or the court a scheme for the execution of the improvement, showing the proposed expenditure. Where the capital money is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards the improvement, on—

- (i.) A certificate of the Land Commissioners certifying that the work has been properly executed, and what amount is properly payable by the trustees in respect thereof; or on
- (ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the commissioners, or by the court; or on
- (iii.) An order of the court directing or authorizing the trustees to so apply a specified portion of the capital money.

Where the capital money to be expended is in court, then, after a scheme is approved by the court, the court may, on a report or certificate of the commissioners, or of a competent engineer or able practical surveyor, approved by the court, or on such other evidence as the court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money towards the improvement. The tenant for life may join or concur with any other person interested in executing any improvement authorized by the act, or in contributing to the cost thereof. He, and each of his successors in title (having a limited estate or interest only in the settled land), must, during such period, if any, as the Land Commissioners prescribe, maintain and repair, at his own expense, every improvement executed under the act, and where a building or work in its nature insurable against damage by fire is comprised in the

improvement, must insure the same, at his own expense, in such amount, if any, as the commissioners prescribe.

Further, neither he nor any of his successors may cut down, or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement, and they must, from time to time, if required by the commissioners, report to the commissioners the state of every improvement executed, and the fact and particulars of fire insurance, if any.

The commissioners may vary any certificate made by them as circumstances appear to require, but not so as to increase the liabilities of the tenant for life, or any of his successors. If the tenant for life, or any of his successors, fail to comply with the requisitions of this section, or do any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land, has a right of action against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned.

The tenant for life, and each of his successors as above, and all persons employed by them, may from time to time enter on the settled land, and, without impeachment of waste, thereon execute any improvement authorized by the act, or inspect, maintain and repair the same, and do, make and use all acts, works and conveniences proper for the execution, maintenance, repair and use thereof, and get and work freestone, limestone, clay, sand and other substances, and make tramways and other ways, and burn and make bricks, tiles and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

Note that the act gives no power to raise money for improvements by mortgage of any part of the settled estate. If it is desired to do so, recourse must be had under sect. 30 to the Land Commissioners, and the money raised with their sanction by means of a rent-charge on the land under the terms and with the formalities laid down in the Improvement of Land Act, 1864. The improvements authorized by that act are, however, extended to comprise all the improvements authorized by the act under consideration, for the application of capital money.

It has been held that the Settled Land Act does not authorize the application of the proceeds of the sale of part of the settled

land in the repayment of moneys borrowed before the act came into operation, to effect improvements under the Improvement of Land Act, 1864. This is not an "incumbrance affecting the inheritance of the settled land" within sect. 21 (ii.) of the act. (*Re Knatchbull's Settled Estate.*)

(i) *The Provisions of the Act as to "Capital-Money."*

We must now turn to the provisions of the act with regard to capital-money. As we have before mentioned, any money received in the exercise of the powers given to the tenant for life under the act will not be receivable by him, but will be considered as capital-money, and must be paid to the trustees or into court. Capital-money includes any money arising under sect. 3 by sale, partition, enfranchisement or exchange; a proportion of the rent under a mining lease (see sect. 11); any consideration paid on the surrender of a lease under sect. 13; money raised by mortgage under sect. 18; a consideration for varying or rescinding the contract under sect. 31 received by the tenant for life; a certain proportion of the money received for timber under sect. 35, sub-sect. 2; and money received on the sale of heirlooms. And sect. 33 provides that, where under a settlement money is in the hands of the trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as they have independently of the act, they may, at the option of the tenant for life, invest or apply the same as capital-money arising under the act. Lastly, by the Settled Land Act, 1884, s. 4, a fine reserved on the grant of a lease under the Act of 1882 is capital-money.

Sect. 21 points out the way in which capital-money is to be dealt with, and provides that it shall, when received (subject to claims payable thereout and to the application thereof for any special authorized object for which it was raised), be invested or applied in one or more of the following modes:—

- (i.) In investment on government securities or other securities which the trustees are authorized by the settlement or by law to invest in, or in bonds, mortgages, debentures, or in the purchase of the debenture-stock of any railway in Great Britain or Ireland incorporated by special act of par-

liament and having, for ten years before the investment, paid a dividend on its ordinary stock or shares, with power to vary investments :

- (ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or of land-tax, rent-charge in lieu of tithe, crown rent, chief rent, or quit rent, charged on or payable thereout :
- (iii.) In payment for any improvement authorized by the act :
- (iv.) In payment for equality of exchange or partition :
- (v.) In purchase of the seignory of any part of the settled land, freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land :
- (vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life :
- (vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land :
- (viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right or privilege convenient to be held with the settled land for mining or other purposes :
- (ix.) In payment to any person becoming absolutely entitled :
- (x.) In payment of costs incidental to the exercise of any of the powers, or execution of any of the provisions, of the act :
- (xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

In order to obtain an investment of capital-money, it must be paid either to the trustees of the settlement or into court, at the option of the tenant for life. The investment or other application will, subject to the provisions of sect. 34 of the act (see hereon *Cottrell v. Cottrell*) be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent

required or direction given by the settlement with respect to the investment or other application by the trustees. Investments are to be in the names or under the control of the trustees. The investment or other application under the direction of the court is to be made on the application of the tenant for life, or of the trustees; and investments or other applications are not, during the life of the tenant for life, to be altered without his consent.

The capital-money while remaining uninvested or unapplied, and securities on which an investment of any such capital-money is made, will be considered as land, and go to the same persons successively, in the same manner, and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone.

The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement; and those securities may be converted into money, which shall be capital-money. Lastly, capital-money arising from settled land in England is not to be applied in the purchase of land out of England, unless the settlement expressly authorizes it.

Supposing land has been acquired by purchase or in exchange, or on partition, it must be made subject to the settlement in the following way:—

Freehold land must be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit.

Copyhold, customary, or leasehold land must be conveyed to and vested in the trustees on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to, on, and subject to which freehold land is to be conveyed; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land would go. Land acquired as aforesaid may be made a substituted security for any

charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion, and in order to the completion, of a sale, exchange, or partition.

Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(k) *As to the Cutting of Timber.*

By sect. 35, provisions are made as to the cutting of timber by a tenant for life. If he is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, he may cut it down and sell it, on obtaining the consent of the trustees, or an order of the court. But three-fourths of the net proceeds of the sale are to be set aside as capital-money, and the other fourth only will go to the tenant as rents and profits.

(l) *Provisions as to the Trustees of the Settlement.*

The 38th to the 43rd sections relate to trustees, and provide *inter alia* that, if there happen to be no trustees within the definition of the act, or it is expedient for the purposes of the act to appoint new trustees, the Court may, on the application of the tenant for life, or any other person having under the settlement an estate or interest in the settled land, or, in case of an infant, of his guardian or next friend, appoint new trustees. (For an instance of an appointment on an application under this section, see *Wheelwright v. Walker*.) It has been decided under this provision that the court will not appoint the tenant for life himself to be a trustee (see *Re Harrop's Trusts*), nor the solicitor for the tenant for life. (*Re Walker's Trusts*.) The persons appointed by the court, and,

till the appointment again of new trustees, the representative of the last surviving or continuing trustee, are to be the trustees of the settlement within the act. Sect. 39 provides that capital-money is not to be paid to fewer than two persons as trustees unless the settlement authorizes the receipt of capital trust money by one trustee.

Then follows a provision as to trustees' receipts, which is practically the same as that conferred on trustees by the Conveyancing Act, 1881, s. 36. By sects. 41 and 43 provisions for indemnity and powers of reimbursement are given to the trustees; and sect. 42 provides that trustees shall not be liable for giving any consent, or for not making, bringing, taking, or doing any such application, proceeding, or thing, as they might do; and that, in case of the purchase of land with capital-money, or of an exchange, partition, or lease, they shall not be liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, or liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

(m) *Lands Settled upon Trust for Sale.*

The last provision of this act of which we shall notice is that contained in sect. 63, the object of which is to make the provisions of the act apply to the case where lands are vested in trustees upon trust to sell, with power for them to postpone the sale at their discretion, and where such directions are followed by a settlement of the proceeds of the sale in the form made use of for the settlement of personal estate. (See *ante*, p. 325.) The act provides that in such a case the money arising from the sale, or the income of the money, or the income of the land till sale, shall be considered as settled land, and the person for the time being

entitled to such income shall be considered the tenant for life. All the provisions of the act are then to apply, except that any reference in the act to remaindermen, reversioners, predecessors or successors in title, shall be deemed to refer to the persons interested in succession in the money. But by sect. 7 of the Settled Land Act, 1884, a tenant for life under a settlement coming within sect. 63 of the Act of 1882 can only exercise the powers given by that act by the leave of the court. And so long as an order of the court giving any leave to any person to execute any of such powers is in force, neither the trustees of the settlement nor any person other than he to whom the leave is given is to execute any trust or power created by the settlement for any purpose for which leave is given by the court. An order giving such leave may be registered as a *lis pendens*, and persons dealing with the trustees will not be affected by it unless it is so registered. Any capital-money arising from the land in trust to be converted under this section shall not be applied in the purchase of land, unless so authorized by the settlement, but may be applied in any other mode in which capital-money may be invested. Any capital-money arising from the settled land, and the securities in which the same is invested, is not to be prevented from devolving as personal estate, unless, if arising under the settlement, it would have been considered as land; and any land taken in purchase, exchange, or partition, shall be vested in the trustees on the same trusts as were subsisting with respect to the settled land, or as near thereto as possible. Though the tenant for life under a settlement falling within the 63rd section of the Settled Land Act, 1882, cannot sell the land without the leave of the court, yet it was held in *Taylor v. Poncia*, and it is now expressly enacted by the Settled Land Act, 1884, that the trustees can sell the property without the consent of the tenant for life. (See also *Re Earle and Webster*.)

Such are the main provisions of the Settled Land Act, 1882, as altered by the Act of 1884. It remains for us now briefly to refer to the provisions of the Settled Estates Act, 1877.

IX. The Settled Estates Act, 1877.

This act defines the expression "settlement" in much the same terms as the Settled Land Act, and, though there is no provision corresponding with sect. 63 of that act, it has been held that where real estate is devised to trustees on trust to sell at their discretion, and invest the proceeds and pay the income to one or more persons successively for life, with remainder over, such estate is a "settled estate." (See *Re Laing*; *Re Horn*; *Beioly v. Carter*.) And by the Conveyancing Act, where a person entitled to land in fee, or for any leasehold interest at a rent, is an infant, the land is to be deemed a settled estate within this act. But there is no definition of a tenant for life, except that it is provided that a tenant in tail after possibility of issue extinct shall be deemed one. (Sect. 2.) The object of the act is to facilitate the leasing and sale of settled estates; but (except under sect. 46) it requires leases and sales thereof to be made after application to and by the consent of the Chancery Division. The leases which the court may authorize are subject to certain restrictions. They must take effect in possession, or within one year from the making thereof, and must not exceed, for an agricultural or occupation lease, 21 years, or 35 years of an Irish estate; for a mining lease, 40 years; for a repairing lease, 60 years; and for a building lease, 99 years. The best rent must be reserved and made payable half-yearly or oftener, and no fine can be taken. Nor is any lease to authorize the felling of trees except under special circumstances, and every lease authorized must be by deed, and the lessee must execute a counterpart, and the lease must contain a condition for re-entry on non-payment of rent for twenty-eight days. The power to authorize leases is extended by sect. 8 to authorize preliminary contracts to grant leases, and any of the terms of such contracts may be varied in the leases; and it also extends to authorize the granting of licences to copyholders to grant leases to persons to the same extent and for the same purposes as leases may be authorized or granted of freeholds under the act. (Sect. 9.)

After approving of a lease, the court may direct who shall execute it as lessor (sect. 12), or it may vest general powers of leasing in the trustees of the settlement, or in other persons as trustees. (Sect. 13.)

As to sales, the court may authorize sales of settled estates and timber (except ornamental timber (sect. 16)); and on any sale minerals, &c. may be excepted. (Sect. 19.) On every sale the court may direct what person or persons shall execute the deed of conveyance. (Sect. 22.) The act then goes on to designate who may petition it for the exercise of its powers, and in effect provides that the application may be made by a tenant for life or for a greater estate, or by the assignee of such tenants. (Sect. 23.) But the application must be made, with certain consents, as follows :—All persons in existence, and all trustees for unborn persons having any beneficial interest, must consent. (Sect. 24.) But if there is a tenant in tail in existence, then persons who have interests subsequent to his need not concur if he is *sui juris*, and the court may dispense with the consent of such persons if the tenant in tail is an infant. (Sect. 25.) In other cases the court may dispense with the consent of any person, having regard to the number and interests of the persons assenting and dissenting respectively. (Sect. 28.) And an order may be made without consent, but subject to the rights of any person with whose consent the court does not think fit to dispense. (Sect. 29.) Where the court does not, in the first instance, think fit to dispense with the consent of any person, it may direct him to be served with a notice requiring him to state within a specified time whether he consents, dissents or submits his interests to the court, and if he omits to comply with the notice he is deemed to have submitted his interests to the court. (Sect. 26.) The court is empowered to dispense with the service of such a notice if the person cannot be found; if it is uncertain whether he is living or dead; if the expense of service would be disproportionate to the value of the property; and the person on whom service is so dispensed with is to be deemed to have submitted his interests to the court. (Sect. 27.)

The court may not exercise the powers conferred on it by the act where an application has been made for a private act of parliament for purposes similar to those which the court may effect under this act, and has been rejected on its merits, or reported against by the judges to whom such bill may have been referred (sect. 32); nor where the settlement expressly provides that they shall not be exercised. (Sect. 38.)

Provisions are made for the application of the moneys arising from sales, which may be paid to trustees appointed by the court,

if the court thinks fit, or into court, and the money will then be applied in redemption of land tax, discharge of incumbrances, in the purchase of other hereditaments to be settled in like manner as those sold, or in payment to any person absolutely entitled. (Sect. 34.) Further, by the Settled Land Act, 1882 (sect. 33), the money may be applied in any of the ways authorized by that act for "capital-money." (See *ante*, pp. 387, 388.)

The act gives certain powers to tenants for life, or for greater estates, if not restrained by the settlement, to make leases without application to the court; and, for the purposes of these powers, a tenant for life will include a tenant by the curtesy or in dower (doweresses are not mentioned by the Settled Land Act, 1882), or in the right of a wife seised in fee. The lease authorized must not exceed twenty-one years in length, or thirty-five years in the case of Irish estates; must take effect in possession, or within a year of its making; it must be by deed, and the best rent must be reserved without fine, and be incident to the immediate reversion. And the demise must not be made without impeachment of waste, and must contain a covenant for the payment of rent, and other usual and proper covenants, and also a proviso for re-entry for non-payment of rent for twenty-eight days; and, finally, a counterpart must be executed by the lessee. (Sect. 46.) The above leasing power only extends to settlements made after the 1st November, 1856. (Sect. 57.) Doweresses and husbands having an estate in the right of a wife seised in fee who wish to make a long lease, will still have to apply under this act, as they are not included in the Settled Land Act, 1882. You will also observe that no notice is required, before leasing, under this section, as under the Act of 1882. Further, with regard to a mining lease for not exceeding twenty-one years, if made under the Act of 1877, the whole of the rent goes to the tenant for life; but this lease could not be made by a tenant for life impeachable for waste, excepting with regard to mines opened when he became entitled to the possession.

Powers given by the act, applications to the court, and consents to and notifications respecting such applications, may be executed, made or given by or to guardians on behalf of infants, and by or to committees on behalf of lunatics, and by or to trustees of the property of bankrupts. But in the cases of infant or lunatic

tenants in tail, no application to the court, or consent to or notification respecting an application, may be made or given by a guardian or committee without special direction of the court. (Sect. 49.) If a married woman applies to the court, or consents to an application to the court, she must, at least if married before 1st January, 1883 (*Re Harris's Settled Estate*; and see *Reddell v. Errington*), first be separately examined as to her free consent to the application; and this examination is to be made even if the property, the subject of the application, is settled in trust for her separate use, and no clause against anticipation is to prevent the court from exercising its powers. (Sect. 50.)

CHAPTER IV.

VOLUNTARY SETTLEMENTS.

I. What constitutes a Voluntary Settlement.

A SETTLEMENT may of course be made after, as well as before, the solemnization of a marriage; but there is this difference between them, that if the settlement be made before the marriage, it is not a mere voluntary one, because marriage constitutes a valuable consideration; whereas, if the settlement be made after the marriage, it is a voluntary one. But there are exceptions to both these rules. For a settlement made after marriage, if made in pursuance of a binding ante-nuptial agreement, stands in the same position as an ante-nuptial settlement. Again, an ante-nuptial settlement may be founded on valuable consideration as to some of the parties taking a beneficial interest under it; but at the same time be voluntary as to other such persons. That is to say, the consideration, consisting of the marriage, may extend to some, and yet not to others, of the parties under it. The husband and the wife, and the issue, are all within the marriage consideration; and, so far as they derive any interest under the settlement, are considered as having given valuable consideration for it. But if the settlement limits estates to collateral relations of the settlor, these limitations are, as a rule, not considered as being founded on valuable consideration given by such collaterals, and the collaterals will be considered as mere volunteers. Thus, limitations of an intended wife's property in favour of the children of a second marriage, and of nephews and nieces, are purely voluntary gifts, and are not within the consideration of the marriage. (*Wollaston v. Tribe.*) But it has been held, that if a woman on her second marriage stipulates that her children by a former marriage shall share in the benefits of a settlement made on that occasion, these children will be considered to be within the consideration of marriage, as well as the issue of the marriage. (*Newstead v. Searles.*) And an ante-nuptial settlement in favour of illegitimate chil-

dren will stand as a settlement for valuable consideration. (*Clarke v. Wright* ; *Dickenson v. Wright*.) And in *Gale v. Gale* it was held, that an intended wife may stipulate for a provision to be made out of her property for her children by a former marriage, or for an illegitimate child, and that a settlement to carry into effect such a stipulation is not voluntary. But where there is a limitation in favour of the wife's next of kin, the next of kin are volunteers. (See *Paul v. Paul*.) It seems to be doubtful whether, in a limitation by a husband in a settlement on his second marriage, under which his children by a former marriage take a benefit, such children are within the marriage consideration. They were so considered in *Jthell v. Beane*. But in *Price v. Jenkins* it was expressly laid down, that a child of a former marriage of a husband was a volunteer with respect to property given to him by a settlement made on his father's second marriage. When, however, *Price v. Jenkins* was heard by the Court of Appeal, it was reversed, though upon different grounds, so that it is uncertain how far it is an authority on this point. Limitations, however, in favour of a stranger to the marriage consideration, if so mixed up with limitations in favour of persons within that consideration that effect cannot be given to the latter without also giving effect to the former, will be upheld, though they are voluntary. (See *Clayton v. Lord Wilton*.) And, as a rule, if the limitations to strangers to the marriage consideration are in favour of the collateral relations, not of the settlor, but of the other party to the settlement, as where the husband is the settlor, and limits property to the collateral relations of the wife, the presumption will be that such limitations must have been the result of some ante-nuptial contract, so that they will be *prima facie* not voluntary.

A settlement made in consideration of marriage by a man or woman with whom he has been previously living, and with whom he goes through a form of marriage, is regarded as a mere voluntary settlement, and a fraud on the husband's creditors. (*Columbine v. Penhall* ; and see *Bulmer v. Hunter*.) And so is a settlement made in consideration of marriage, but containing a power of revocation by the settlor. (See *Pannell v. Steadman*.) For such settlements are "mere shams," and are not entitled to rank in the same light as ordinary marriage settlements.

Post-nuptial settlements are not necessarily voluntary, for they may of course rest on other valuable consideration than mere settlement of property. Thus, a post-nuptial settlement is not voluntary, if it is made in consideration of the conferring of a further portion, or of an agreement to pay a further portion which is afterwards paid; and the loan of money to the settlor by a relative of the wife has been held to prevent a settlement on the wife being voluntary. (*Bayspoole v. Collins.*) Again, a settlement by a husband and wife (previous to the Married Women's Property Act, 1882), of the wife's property to her separate use, remainder to the husband for life, remainder to the children, though a post-nuptial one, is not voluntary, as there is a valuable consideration constituted by the husband modifying his life interest in possession, and the wife her inheritance. (*Hewinson v. Negus, Teasdale v. Braithwaite.*) And in *Price v. Jenkins* (followed in *Re Lulham*, and also in *Re Foster and Lister*) it was held that a post-nuptial settlement of leaseholds, to which a heavy liability was attached, was not a voluntary one within 27 Eliz. c. 4, the liability constituting a valuable consideration. But this case will not apply so as to prevent such a settlement being voluntary and void and fraudulent under 13 Eliz. c. 5, against creditors. (*Ridler v. Ridler*; and see *Ex parte Hillman, Shurmur v. Sedgwick*; and *Schrieber v. Dinkel.*) Again, an agreement by the wife to resign a contingent interest to which she is entitled, forms a valuable consideration. (*Ward v. Shallett.*) So, too, there is valuable consideration where the wife relinquishes her interest under an existing settlement, or her jointure, or dower, or mortgages her separate estate to pay the husband's debts, or if a husband relinquishes his estate in *jure mariti*.

II. How far Voluntary Settlements are liable to be avoided.

What, then, are the consequences of a settlement being voluntary? There are three statutes which bear on this point. By 27 Eliz. c. 4, all conveyances, &c. of lands, tenements, and hereditaments, made with intent to defeat or defraud purchasers, and also all conveyances with a clause of revocation at the grantor's pleasure, are void as against subsequent purchasers. It has been settled that all voluntary deeds, except those made in favour of a charity, are fraudulent within this statute, and so void as

against a subsequent purchaser, even if that purchaser have notice of the voluntary conveyance. (*Otley v. Maning.*) But this is only so when the voluntary conveyance and the subsequent sale for value are made by the *same* person, so that if the heir of a person who has made a voluntary conveyance and is dead, makes a sale for value of the same premises, such sale will not defeat the voluntary conveyance. (*Newman v. Rusham.*) And, again, if a person to whom a voluntary conveyance has been made, sells the premises granted thereby to a purchaser for value, the purchaser takes a good title, and cannot be disturbed by a subsequent purchaser from the original settlor. But a voluntary conveyance remains good as against the grantor and all persons claiming under him, except a purchaser for value; so that, if of two voluntary grantees the second one in point of time sells the premises to a purchaser for value, the purchaser will get nothing, because the first voluntary conveyance divested the original grantor of all his interest, and he had then nothing to pass to the second voluntary grantee, who accordingly would have nothing to convey to a purchaser.

By 13 Eliz. c. 5, all conveyances, &c. of land, goods or chattels, made with intent to delay, defeat, or hinder creditors, are void as against them, save as to purchasers for valuable consideration without notice. Voluntary conveyances are not necessarily void under this statute, and, indeed, if the intent to defraud is clear, a conveyance, even though it be for value, is void under it. (*Holmes v. Penney*; see also *Re Johnson.*) But a voluntary deed will be presumed to have been made with the intent to defeat creditors, if that will be its probable effect, having regard to the amount of property included in it, and the amount of the settlor's indebtedness at the time he made it. (See *Jenkyn v. Vaughan.*) And generally a voluntary settlement will be avoided by showing that the settlor was so much embarrassed at the date thereof, that the effect of the settlement would probably be to defeat creditors. (See *Crossley v. Elworthy*; *Ex parte Russell.*) In *Forth v. Chapman*, it was said that the test of the existence of an intention to defeat creditors was, whether at the settlement the settlor could have paid his debts without having recourse to the property comprised in the settlement; but later cases would seem to show that a voluntary settlement may be set aside though the settlor could have paid his debts

at the date of the settlement without the aid of the property comprised therein, if he contemplated a state of things which might not improbably result in bankruptcy or insolvency, as if he were engaging in a hazardous business, or was incurring heavy liabilities. (See *Mackay v. Douglas*; and *Ex parte Russell*.) And in *Re Pearson*, where a person, not engaged in trade and who owed no debts, made a voluntary settlement, whereby money was settled in trust to pay the income to the husband for life or till bankruptcy, remainder to the wife for life, for her separate use, remainder to the children, with an ultimate remainder to the settlor, and he a long time afterwards engaged in trade and became bankrupt, it was held that the settlement was fraudulent and void as against creditors. A voluntary deed may be set aside by a person who became a creditor of the settlor subsequent to the deed, even though there is no creditor left whose debt was in existence at the date of the settlement. (*Taylor v. Coenen*; *Ware v. Gardner*.) Time does not run in connexion with the statute, and so a voluntary conveyance can be impeached at any distance of time. (See *The Three Towns Building Co. v. Maddison*.)

Lastly, by the Bankruptcy Act, 1883, a voluntary settlement will, if the settlor becomes bankrupt within two years after the date thereof, be void as against the trustee in bankruptcy; and if he becomes bankrupt at any subsequent time within ten years thereafter, be void against such trustee, unless the parties claiming under it can prove that the settlor was at the time of the making thereof able to pay all his debts without the aid of the property comprised therein, and that the property passed to the trustee on the execution of his settlement.

III. How far a Voluntary Settlement can be recalled.

Another point in connection with a voluntary settlement, whether of realty or personalty, which is deserving of notice is, that it cannot be revoked or varied by the settlor, if it has been carried into effect by the assignment of the property, or by the creation of valid trusts. (See *Ellison v. Ellison*; *Paul v. Paul*.) The rule is that where a person who, with his eyes open, makes a voluntary settlement without any undue influence brought to bear on him,

and without fraud practised on or misrepresentation made to him, he is bound by his own settlement. Thus, in *Ingold v. Powell*, where there was a voluntary settlement of personalty without a power of revocation, it was held that such a settlement (unless there was some fiduciary relationship between the parties) could only be set aside if the settlor could show that he acted under undue influence, or that, at the time of executing it, he was labouring under some mental incapacity; and in *Henry v. Armstrong*, it was laid down that, if a person of full age and of sound mind executes a voluntary conveyance, he cannot have it set aside without giving substantial reasons why the transaction should not stand, and the fact that the deed contained no power of revocation will not throw on the grantee the onus of supporting it. Again, in *Phillips v. Mullings*, where a young man of improvident habits was induced by a trustee of some money to which he was entitled to make a voluntary settlement of it on his wife and children, and the deed was fully explained to him and his attention called to the particular clauses, it was held that the deed was irrevocable; on the other hand, where a widow who was very much under the influence of a clergyman made a voluntary settlement in his favour, it was held to be invalid. (*Huguenin v. Baseley*.) And in *Turner v. Collins*, where a father induced his son, who was still under his roof and subject to his influence, to make a settlement on his step-brothers and sisters, it was held that if the son had applied promptly, the court would have set it aside, but, as he had stood by for some years, he was not entitled to relief, as by doing so he had practically confirmed the settlement. A settlement which is *prima facie* void or revocable may be made good or irrevocable also by other circumstances, as by the settlor subsequently acting under the deed, or doing something which shows that he recognises its validity. (See *Davies v. Davies*.) Where a voluntary settlement contains no power of revocation, however, it will not require much to induce the court to set it aside, for it presumes that the grantor of such a settlement would, if he had known, have naturally wished to secure to himself the right to revoke it (see *Everett v. Everett*); and this will be especially the case when there is evidence that the settlor was not aware as to the effect of the settlement or as to its contents. (See *Toker v. Toker*; *Phillips v. Mullings*; *Hall v. Hall*.) If you should be acting for

a person who wishes to make a voluntary settlement it will be your duty to suggest to him the propriety of inserting a power of revocation, though the absence of such a power will not affect the validity of the deed, and the court will not consider the propriety or impropriety of such a clause, except as evidence that the settlor did not understand what he was doing. (*Dutton v. Thompson.*)

IV. Agreements for Voluntary Settlements.

Another point for consideration with regard to voluntary settlements is the question, will an agreement to execute such a settlement be specifically enforced, or, will a settlement which is imperfect be carried out by the court if, at the same time, it is a voluntary one? The rule hereon is that, where a trust is voluntary, the court will not enforce it unless the settlor has done everything in his power which, according to the nature of the property, is necessary to be done in order to establish a complete and executed trust. Thus, the settlor must either have actually declared himself to hold the property as a trustee for the volunteers, or must have shown an intention at least to constitute himself a trustee *in præsenti*, and not merely an intention to create a trust *in futuro* (which intention is to be gathered from the nature of the transaction and of any other evidence which shows that he considered that he was actually a trustee of the property and did not merely consider that he had made a gift of it), or he must have transferred his whole interest in the property to a trustee, or have done all in his power so to transfer it for the purposes of the settlement. These propositions may be illustrated by the following cases. In the case of *Jeffries v. Jeffries*, where a father, *inter alia*, covenanted to surrender copyholds to the use of trustees, to be held by them on certain trusts, but died without having surrendered them, and, moreover, after having devised certain portions of them to his wife, it was held that the court would not carry out the intended settlement and decree a surrender of the copyholds; for the settlor had neither declared himself a trustee, nor had he surrendered the copyholds to the trustees, but had merely entered into a voluntary contract to transfer them. (See also *Jones v. Lock*, where there was an imperfect gift of chattels and no declaration of trust, and it

was said that cases of this kind all turn on the question whether there has been a declaration of trust or an imperfect gift. In the latter case the parties would receive no aid from the court if they claimed as volunteers; but when there has been a declaration of trust then it will be enforced, whether there has been consideration or not.) Again, where there was an imperfect assignment of a share in a company, the assignment being only by indorsement on the share, which was retained by the assignor, it was attempted to enforce the assignment by contending that it operated as a valid declaration of trust. But the court held that, as the alleged settlor had not declared himself to be a trustee, but had meant to make a gift, and there was no case in which a person has been compelled to perfect a gift which in the mode of making it he has left imperfect, the contention could not prevail. (*Antrobus v. Smith*. See also *Milroy v. Lord*; *Richards v. Delbridge*.) In a recent case (*Re Breton's Estate*), where there was an imperfect assignment of furniture by a husband to his wife by letters, the court followed *Milroy v. Lord* in preference to the later cases, *Baddley v. Baddley* and *Fox v. Hawks*, and held that the imperfect assignment could not be construed as a declaration of trust and could not be enforced; and the same course was adopted still more recently in *Pethybridge v. Burrow*, where there was an imperfect gift of a bond, and the Court refused to uphold it as a declaration of trust. Where, however, the attempted assignment is imperfect, but the alleged assignor has done all in his power to pass the property, the imperfect assignment will be upheld. Thus, where the assignor had an agreement for a lease, and executed a voluntary settlement, assigning all his interest to trustees on certain trusts, and it was objected that he had not declared himself a trustee and had not conveyed the leaseholds to the trustees, it was said that the assignor had done all he could have done at the time of his making the assignment to pass the leaseholds, and the gift was enforced. (*Gilbert v. Overton*. And see *Kekewich v. Manning*.)

For fuller information on this subject we refer you to Snell's Principles of Equity.

PART V.—WILLS.

CHAPTER I.

ON THE WILLS ACT, 1837.

WE propose to commence our observations on wills by a consideration of the Wills Act, 1837, as we shall find that in doing so, we shall be enabled to glean information on points of law in connection with the following subjects:—(1) What property may be disposed of by a will; (2) Who may make a will; (3) The formalities made essential by law to a valid will; (4) The revocation of a will; (5) Revival of revoked wills; (6) Alterations in wills; (7) The time from which a will speaks; (8) What property is included in a general devise; (9) The effect of a devise without words of limitation; (10) The meaning of the expression “die without issue;” (11) The amount of the estate which trustees will take under various circumstances; (12) When a lapse of a devise or bequest will occur.

I. What Property may be disposed of by Will.

Sect. 3 of the act empowers a testator to dispose by his will of the following descriptions of property:—All real and personal estate to which he shall be entitled at the time of his death, and which, if not dealt with by the will, would devolve on his heir or personal representatives; customary freeholds and copyholds, though the testator has not surrendered them to the use of his will, though he has not been admitted to them, and though there is some custom in the manor which prevents or restricts the power of alien-

ating them by will ; estates *pur autre vie*, whether there is or is not a special occupant thereof, and of whatever tenure the same may be, and whether they are corporeal or incorporeal hereditaments ; contingent, executory, or other future estates or interests, and rights of entry ; and, generally, all real and personal estate to which the testator is entitled at the time of his death, although he may have become entitled to the same after the execution of the will : with regard to copyholds, however, the devisee of them must pay the proper fines before he can be admitted, and the will must be entered on the court rolls.

By the old law, an interest which was contingent at the time of the making of the will could not be devised if the testator was not then ascertained as the person in whom, or in whose heirs, it must vest, if it vest at all. And for the will to pass a legal estate, it was necessary that the testator should be seised at the time of his death, as well as at the date of the will ; while a devise only operated upon such real estate as he possessed at the date of the will, and freehold lands purchased afterwards would not pass. A term of years, however, purchased by a testator after the execution of his will would pass under it. Again, by the old law, a joint tenant could not devise his share, even though he survived his co-tenant, if his will was made before the death of the latter. And even though the joint tenancy was severed, a will made before severance would not operate to pass a share.

The provisions of the Wills Act are so comprehensive that it may safely be said, that it enables a person to dispose by will of every description of property. Of course, it will not enable a tenant in tail to dispose of his estate without previously disentailing it, as this is an estate which would not, if undisposed of, go to his heir-at-law, for it only goes to the heir of his body, and that not by law, but by the effect of the original grant creating the estate tail. Nor does the act enable a joint tenant to make a devise of his share, so as to defeat the *jus accrescendi*, or right of survivorship, belonging to his co-tenant.

II. Who may make a Will.

Infants.—First of all, an infant cannot do so. (Sect. 7.) Query, however, if this section prevents a soldier on active service from

making a will, even though a minor, if the will deal with personalty only. (See *Re Farquhar*.)

Married Women.—The act provided that a married woman should only be able to make such wills as she might have made before the passing of the act; but this has been materially qualified by the recent Married Women's Property Acts. The result of the Act of 1882 is, that the will of a married woman, dying after 1882, is as valid as if she were a *feme sole*; but if executed during coverture, it will only pass such property as was hers for her separate use during coverture, and not property which comes to her after the coverture has determined. (See *Re Price*; *Stafford v. Stafford*.) As to the wills of those who have died before that date, as to real estate, they could dispose of it by will, if the husband was banished or transported for life; if a judicial separation or a protection order had been obtained; if the will was made in execution of a power of appointment, or if the land belonged to her for her separate use. (*Taylor v. Meads*.) She could dispose of her personalty under the same circumstances, and further, she might make a will thereof, if her husband consented to the particular will, survived her, and gave his consent to the probate thereof when it was proved. Further, she could by will bequeath property vested in her as executrix. (See *Willock v. Noble*.)

Insane Persons.—If a person has been found of unsound mind by inquisition, the presumption is, that he continues in that state of mind till his death, so that the will of such a person was not admitted to probate, though he recovered his reason before death. (*Grimandi v. Draper*.) But if it be shown that the will was made during a lucid interval, it will be good; and where a will was actually executed in a lunatic asylum, it was held valid, it having been established that it was made during a lucid interval. (*Nicholls v. Binns*.) There are many cases on the question of how far insanity, if it be only partial, as where it consists in delusions on particular points only, the mind being sound upon other points, affects the testamentary capacity. A mere capricious or eccentric disposition by will does not argue that the testator was insane, and if the will is the true exposition of a man's real mind, effect will be given to it, however eccentric it may appear, and however

eccentric the testator may have been in his general habits of life. (See *Boughton v. Knight*.) But if, for instance, a testator should be under the delusion that he is a member of the royal family, and should leave his property to his wife for life, and after her death to members of the royal family, to the exclusion of his relations, the will would be invalid, even with regard to the life interest given to the wife. (See *Smee v. Corporation of Brighton*.)

Mere eccentricity will not invalidate a will, nor will moral insanity or moral perversion of feelings; there must be at least intellectual insanity, the test of which is delusion. (*Freer v. Peacocke*.) A will which is rational in itself is strong evidence of the testator's sanity when making it (*Cartwright v. Cartwright*), and the onus of proof of insanity lies on him who wishes to upset a will on this ground. (See *Groom v. Thomas*.) Again, though it is clear that if a will is made under the influence of a delusion it is void, as the testator's mind is unsound, yet a delusion may precede or succeed the will without affecting its validity. (*Jones v. Goodricht*.) For, if the insane delusion is on a subject which does not affect the clearness of the testator's mind with regard to business matters, his property, and other matters coming within the scope of his will, it will not incapacitate the person whom it possesses from making a valid will. If there is a total absence of connexion between the delusion and the will, the will will be good. (*Banks v. Goodfellow*.)

The will of a drunkard stands on much the same footing as that of a lunatic. If the intoxication renders the brain incapable of discharging its proper functions, a will executed during a fit of intoxication will not stand. (See *Wheeler v. Alderson*.)

Aged Persons.—A person may also be incapacitated from making a will by old age, if it is so extreme, or death is so near, as to prevent the mental faculties retaining sufficient power to comprehend the act about to be done. (*Prinsep v. Sombre*.)

Idiots, &c.—The will of an idiot is, of course, void. So apparently also is the will of one deaf, dumb and blind. A person born deaf and dumb cannot make a will unless he clearly understands what a will is, and evinces his wish to make one. (See *Dickenson v. Blinett*.) If he can write and read there will be but little difficulty about the

matter; but if he can do neither it will be necessary, before the will is admitted to probate, to show how he communicated his wishes and how he signified his knowledge and approval of the contents of the will. (*Fairclough v. F., Re Ouston.*)

Blind Persons.—As to a blind person's will, it must be shown that it was read over to him, or, at least, that he knew and approved of its contents. (*Moore v. Paine.* See also *Newton v. Best.*) And, by the Probate Rules (Rule 71), before probate of the will of a blind or obviously illiterate or ignorant person will be granted, satisfactory evidence must be given that the will was read over to the testator before execution, or otherwise that he had a knowledge of its contents.

Felons.—Felons can now, owing to the provisions of the Felony Act, 1870 (33 & 34 Vict. c. 23), make a will; for upon their death their property reverts, and a will only speaks from the testator's death.

Persons under undue Influence.—But even when a person is under no personal incapacity, his will may be invalidated from the circumstance that he was under undue influence at the time of making it. (*Mountain v. Bennet.*) But it will never be presumed that such influence has been exercised, and it must be proved to have been used. (*Boyse v. Rossborough.*) Undue influence does not bear the same meaning in its legal sense as it does in its popular sense; for mere bad companionship, or bad example, may influence a man in making his will, but it will not be sufficient to invalidate it. In its legal sense, it means something in the nature of force or fear destroying free agency. (See *Williams v. Soude.*) In *Boyse v. Rossborough* it was said that undue influence was an influence which could be described to have caused the execution of a paper pretending to express the testator's mind, but which did not really express that mind, but expressed something else which he did not mean. There must be coercion or fraud. It is not necessary to show that actual violence has been used, or even threatened; nor is it necessary to show positive fraud. But mere persuasion, unless it virtually amount to the effect of force or fear, will not amount to undue influence. (*Dickenson v. Moss.*) Thus, imaginary terrors may be sufficient to deprive the testator of free agency, and con-

trivances producing false impressions may be equivalent to positive fraud. In considering whether a threat is sufficient to amount to undue influence, the quality of the threats, and the person threatened and making the threat, and other circumstances, will be taken into consideration. (See *Nelson v. Oldfield*.) Generally, the question of what amounts to undue influence is a question of fact in each particular case, and no general rules can be laid down on the subject. The great question is, of course, Was the will the result of the undue influence, or was it the voluntary act of the testator? (See *Kinderside v. Hanson*, and on the subject generally, the leading case of *Huguenin v. Basley*.) Mere natural influence, such as that possessed by a relation or a friend, may apparently be used to obtain a benefit by will. (*Parfitt v. Lawless*.)

III. The Formalities made essential by Law to a Valid Will

The Execution and Attestation of Wills.—Previous to the Wills Act, 1837, while wills of personal estate, if attended with certain formalities, might be made by word of mouth, and, if reduced into writing, did not require any witnesses, wills of real estate had, under the Statute of Frauds, to be in writing, and to be signed by the testator in the presence of three or four credible witnesses. Now, however, by sect. 9 of the Wills Act, both wills of real and personal property must be executed with the same formalities. These are as follows:—(a) The will must be in writing. (b) The testator must sign it, or someone must sign it for him in his presence and by his direction. (c) The signature must be made, or acknowledged, by him in the presence of two witnesses. (d) The signature must be at the foot or end of the will. (e) The witnesses must sign in the presence of the testator; but no form of attestation is necessary, nor need the witnesses sign in the presence of each other. (*Re Allen*.)

(a) The will must be in writing. There is an exception to this rule created by sect. 11, which provides that any soldier, being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have done before the act. The result is, that such persons can still make a nuncupative will, or will by word of mouth. “Actual military service” means on an expedition, and a soldier in barracks, whether at home

or abroad, cannot make a nuncupative will. (*Drummond v. Parish*; *White v. Repton*.) Wills made on the field of battle will, of course, fall within the exception created by the section (*Re Churchill*); and a minor has been held capable of making a will as a soldier on active service. (*Re Farquhar*.) This case was decided, however, before the Wills Act, and as that act says that the will of no minor shall be valid, it is perhaps not law at the present day. Mariners include persons in her Majesty's navy (*Re Hayes*), and merchant seamen (*Re Parker*.) The expression "at sea" is very liberally construed; and an admiral who was in a river on an expedition was deemed to be at sea. (*Re Austen*; and see *Re Lay*, where a seaman who went ashore whilst his vessel was in harbour at Buenos Ayres, and died there by accident, was held to be at sea.)

A will may be written on any substance, and it is immaterial whether it is in ink or in pencil. Formerly it was thought that, if only pencil writing was used, the act was only deliberative; but it is clear that a will signed in pencil is now well executed. Thus, a will and codicils written indiscriminately by the testator in pencil and in ink will be valid if the court is satisfied that the testator intended them to operate as his will. (*Rhymes v. Clarkson*.) Nor need the will consist of one whole and entire document; for other papers and documents may be incorporated into it and made to form part of it. But a document cannot be incorporated unless it be in existence at the date of the will (*Allen v. Maddock*); and further, it must be clearly identified, though it is allowable to have recourse to parol evidence to establish such identification. Reference to a paper not executed according to the statute makes it part of the will of the testator, if it was in existence when the will was executed and it is identified beyond all doubt. (*Re Edwards*; *Utterton v. Robins*.) It is not necessary to set out the particular document in the will; but the necessity of clearly identifying it is always paramount. It is of no consequence that the incorporated document is of itself invalid. (*Re Smart*.) But a deed referred to as "made" by the testator, but which was not in fact executed by him, was held not to be incorporated. (*Re Edwards*.) In a recent Irish case (*Re Kehoe*) it was laid down that the three following essentials must exist in order that an unattested document may be incorporated: (1) There must be a reference in the will to

the document as existing; (2) proof that the document propounded was written before the will was made, and (3) proof of identity of document.

The testator must sign the will, or someone must sign for him in his presence and by his direction. This signature must be made before those of the witnesses; for it is necessary to a valid attestation that the witnesses should see the testator's signature. (*Re Olding*; *Shaw v. Nicholl*.) The testator's mark is a sufficient signature, even though his name nowhere appears (*Re Bryce*), and this whether he can or cannot write. (*Re Field*.) Nor is it absolutely necessary that the testator sign his name in full; a signature by initials is sufficient. (*Re Wingrove*.) And a signature in an assumed name has been held good (*Re Redding*); and so has the signature by a married woman in the name of her first deceased husband. (*Re Glover*.) But sealing without signing is not a good execution. (*Re Summers*.)

If the signature is made by some third person, it must be made in the presence of the testator, and this will not be considered to have been done unless the testator is shown to have seen the signature made, or at least to have been in such a position that, had he looked, he could have seen it. It is no objection that the third person is one of the witnesses to the will (*Re Bailey*), and the execution is good though that third person sign his own instead of the testator's name.

The signature must be at the foot or end of the will. The meaning of the expression "foot or end" has been explained by a subsequent statute (15 & 16 Vict. c. 24), which provides that a signature shall be deemed to be so placed if it is placed at or after or following, under or beside or opposite to the end of the will, so long as it is apparent that the testator intended to give effect by the signature to the writing signed as his will. No will will be affected by the circumstance that the signature does not follow immediately after the foot of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or that the signature is placed among the words of the testimonium clause, or clause of attestation, either with or without a blank space intervening, or follows or is after or under or beside the names of the witnesses, or by the circumstance that the signature is on a side or page or other portion of the paper or

papers containing the will, whereon no clause of the will is written above the signature. But no signature is to be operative to give effect to any disposition or direction which is underneath or which follows it, nor to any disposition or direction inserted after the signature is made. (For instances of what has been held good or bad signature under this statute, we refer you to the following cases: *Hunt v. Hunt*; *Re Coombs*; *Re Archer*; *Re Huckvale*; *Re Pearn*; *Re Horsford*.) This last case is deserving of mention on account of its curiousness. The signatures of the testator and witnesses were on a separate piece of paper, which was attached to the paper on which the will was written by a piece of string opposite to the ending of the will; it was held that the will was well executed. If the signature immediately follows the last word of the will, it does not matter that there are blank spaces in other parts of the will; for the act is silent as to such blanks in the body of the will. (*Carneby v. Gibbons*; *Hunt v. Hunt*.)

The signature of the testator must be made or acknowledged by him in the presence of two witnesses present at the same time. Both the witnesses must be present together when the will is signed, or when the signature is acknowledged. (*Re Mansfield*.) And, further, they must both sign in the presence of the testator, though they need not sign in the presence of each other. (*Re Allen*. But see *Casement v. Fulton*.)

It is not necessary that the testator should actually see the witnesses sign, but he must have been in such a position that he could have seen them if he had wished (*Casern v. Dade*); so that he ought not to be shut out from the view of them, as by a curtain or screen. (*Tribe v. Tribe*.) But in *Newton v. Clarke*, where a curtain intervened between the testator and the witnesses, the attestation was held good, as the testator might have drawn aside the curtain and seen the witnesses, had he so chosen. A blind testator, of course, cannot see the witnesses, but it has been held, curiously enough, that he must be in such a position that he could have seen them, if he had been in possession of his sight. (*Re Piercy*.)

Instead of making his signature in the presence of the witnesses, it is open to the testator to make it beforehand, and then to call in witnesses and acknowledge the signature before them. The acknowledgment need not be made in express words; it is sufficient if made by gesture (*Re Davies*), or by a simple request to the witnesses to place their signatures underneath that of the testator.

(See *Gaze v. Gaze* and *Re Warden*.) In *Blake v. Blake*, it was said that where the testator signs the will before the witnesses come into the room, and they do not see or have not the opportunity of seeing his signature, or if at any rate they have not seen him write on the document which they attest, there can be no acknowledgment to satisfy the statute, even if the testator says that the paper to be attested is his will, or that his signature is inside the paper. This case disapproved of *Beckett v. Howe*, where the witnesses did not see the testator sign, nor did they see his signature, yet the court held that there was a sufficient acknowledgment. And it also conflicts with *Smith v. Smith*, where the testator was seen writing, but his actual signature was not seen by the witnesses. However, in this case the testator told the witnesses that in consequence of his wife's death he was obliged to make a change in his affairs and requested them to sign, and this no doubt was enough to convey to them the knowledge that he was making a new will. The true rule would seem to be that the witnesses must see, or at least have been able to see, that the document actually bears the testator's signature, though it is not necessary that they should know that the instrument signed is a will. (See *Pearson v. Pearson*.) The acknowledgment, however, if it is made, must be made by the testator himself. It will not do for some third person to put the will before the witnesses already signed by the testator and ask them to attest the signature. (*Morrit v. Douglas*.) But a testator can acknowledge a signature made for him by someone else. (*Re Regan*.)

It has been questioned whether or not a lunatic can be a good witness, it being contended for the affirmative view that all the act requires is a bodily presence, and not a mental one. (See *Hudson v. Parker*.) But the use of the word "subscribe" would seem to imply that a witness must do something more than merely sign his name. He must be conscious of and understand what is being done, and, as was said in *Griffiths v. Griffiths*, have the intention of attesting the execution.

As in the case of the testator's signature, so also in that of the signature of the witness, his mark is sufficient, even if he can write (*Re Amiss*); so, also, is a signature by initials. (*Re Christian*.) And if he cannot write his hand may be guided; but this may not be done if he can write. (*Re Kilcher*.) And the mere writing of the name of the witness by a third person,

if the witness does not also make his mark, will not amount to a sufficient attestation. (*Re Meade.*) A witness cannot, like a testator, merely acknowledge a signature previously made by him. (*Moore v. King.*) And it has been held, that if, on the re-execution of a will, the witness with a dry pen traces over his previous signature, this, though it would be good in the case of a testator, is bad as an attestation. (*Playne v. Scriven; Charlton v. Hindmarsh; Re Maddock.*) No special form of attestation is required; but it is advisable to append a full form of attestation, as follows: "Signed and acknowledged by the said A. B., of &c., as his last will in the presence of us, present at the same time, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as attesting witnesses." If the attestation be in this form, probate of the will will be granted without any special affidavit from the attesting witnesses.

The fact that the attesting witness is incompetent to be admitted as a witness to prove the execution, whether that incompetency exist after or at the time of the execution, will not make the will invalid. (Sect. 14.) Nor will a devise, legacy, estate, interest or gift to a person, or the husband or wife of a person, who attests the will prevent such person from being admitted to prove the execution thereof; but such witness will lose the benefit of the devise to him. (Sect. 15.) Before this section, the gift to a witness of a will of personalty only was not void, as such a will did not require a witness at all to establish it; and as to wills of realty, although 25 Geo. 2, c. 5, provided that a gift to an attesting witness should not cause the will to be void, but should merely cause a forfeiture of the gift, yet the statute made no provision in respect of gifts to a husband or wife of a witness, and such gifts rendered the will void until the passing of 1 Vict. c. 26. Under the present act it has been held (*Gurney v. Gurney*; and see *Tempest v. Tempest*), that where a legacy is bequeathed by a will to a person, and that person afterwards attests a codicil to the will, the gift to him by the will is still good, and this even though the codicil indirectly operates to benefit the witness, as where he is residuary legatee under the will, and the codicil which he attests revokes some of the legacies in the will, and so increases the amount of the residue. If the witness subsequently to the will marries a person who takes a

benefit under it, this will not cause a forfeiture of the benefit. (*Thorpe v. Bestwick*.) And a gift in a will which is bad, because made to an attesting witness, can be rendered good by confirmation in a codicil attested by different witnesses. (*Anderson v. Anderson*.)

The act specially provides that an executor may be a witness, and also a creditor of the testator, though the testator's estate is charged with payment of his debts. (Sects. 16, 17.)

Sect. 10 of the act relates to the execution of testamentary appointments, and provides that no appointment made by will in the exercise of any power is to be valid unless the same be executed in the same way as an ordinary will; and further, that a will executed as the act requires an ordinary will to be executed, will, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, though the power expressly requires some additional or other form of execution or solemnity. This section only relates to the execution and attestation; so that all other formalities prescribed by the power, such as registration, enrolment, &c., must be observed.

Domicile.—It will not be out of place here to make some few remarks on the subject of domicile. A man's domicile is of three kinds:—(1) Domicile of birth or origin; (2) domicile by operation of law; (3) domicile of choice. (1) This is the domicile acquired by every child on birth, and it follows the domicile not of the place of birth, but that of the father, if it is legitimate, and that of the mother if it is illegitimate. (2) This domicile attaches to persons who are under the protection or control, in some way, of another person. Thus, a wife's domicile is the same as that of her husband, and it remains her domicile after his death until she marries again. (*Bloxam v. Farre*.) Her domicile then changes to that of her new husband, and with it will change the domicile of her infant children by the first marriage. If an infant has a guardian, it seems doubtful if the domicile of the guardian is also that of the infant. (See *Douglas v. Douglas*.) A minor may not, while still a minor, himself change his domicile, unless he has emancipated himself. This emancipation, however, he may effect by freeing himself from control, as where he marries, or where he enters the service of the crown, the militia or the police force; and, when thus emancipated, he may choose a domicile of his own. The following

are further points on this kind of acquired domicile. A lunatic's domicile is that of his guardian or committee. A domestic servant does not change his or her domicile by entering into service; nor does an officer in the army by serving in foreign parts; but if he enters the service of a foreign state, he acquires a domicile in that state. But a domiciled Irishman does not acquire a domicile in England by entering the Royal Artillery, nor a Scotchman by entering the English naval service. (*Brown v. Smith.*) An ambassador's domicile and a consul's remain that of the country which they respectively represent. (3) Every person *sui juris* can choose a domicile; but a person will retain his domicile of origin until not only a new domicile has been acquired, but also until he has shown an intention to abandon his former domicile. And even where a domicile of choice has been acquired, the domicile of origin is not extinguished, and is capable of reviving on the abandonment of the domicile of choice. To acquire a domicile by choice there must be actual residence in the place chosen, and it must be the principal and permanent place of residence. It must be chosen not for a mere special and temporary purpose, but "with the present intention of making it a permanent home, unless and until something unexpected happens to induce the person to adopt some other permanent home." (*Lord v. Colvin.*) In brief, the change of residence must be voluntary and permanent in character, and made with the intention to settle in the new place as a permanent home. (See *Douglas v. Douglas*, and the quite recent case *Patience, Re, Patience v. Main*, which shows that residence in a country without these qualifications will not take away the original domicile, however long it may be.

Now a will of real estate must be executed according to the forms required by the law of the country where the estate is situate, excepting that wills of land in Scotland are deemed valid, though executed in accordance with the law of England (see 30 & 31 Vict. c. 101); but a will of personal estate is good if made in the form and with the formalities of execution required by the law of the testator's domicile, at the date of the making of his will, *and* at the date of his death. If the testator changed his domicile after making his will, the old law was, that the law of the testator's domicile at the time of his death governed the case, and that the will had to be executed according to such law, unless made in the execution of a power, when it would be validly executed if executed according to the law of either domicile. (*D'Huart v. Harkness.*)

But now by 24 & 25 Vict. c. 114, every will made *out* of the United Kingdom by a British subject, whatever his domicile at the time of executing it, or at the time of his death, shall, as regards personalty, be well executed if made according to the forms required by the law of (1) the place where made, or (2) of the place where he is domiciled when it is made, or (3) of his domicile of origin. And as to wills made *in* the United Kingdom by a British subject, the same result is to follow, if the will is executed according to the forms required by the law in force in that part of the United Kingdom where the same is made. Thus, if a testator's original domicile is in England, and he is domiciled in France, but goes to Switzerland on a visit, and there makes his will, he may execute it according either to the law of Switzerland, France, or of England. And he may execute it according to the English or French law, if he be domiciled in England, and goes to France on a visit, and there makes his will. Again, if domiciled in England, and when on a visit to Scotland he made his will, it would be valid if executed according to the English or the Scotch law.

But this statute only applies to British subjects; so that if an English lady marries a foreigner, *e. g.*, a German, and goes and resides in Germany, she ceases to be a British subject, and consequently, on her husband's death, a will made by her while still domiciled in Germany, must be made according to the German law, otherwise it will not be admitted to probate so as to pass property here. It was so held in *Bloxam v. Favre*.

By 24 & 25 Vict. c. 121, whenever a convention to that effect is made with a foreign state, it may be directed by an Order in Council, that a British subject, residing in a foreign country, shall not be deemed to have acquired a domicile for testamentary purposes or purpose of succession to moveables, unless he has resided there a year, and deposited in a public office a declaration of his intention to become domiciled there.

IV. The Revocation of Wills.

Presumption of Intention.—Under the Wills Act no revocation may be effected by any presumption of an intention on the ground of an alteration in circumstances. Nor will any conveyance or act, subsequent to execution, of or relating to the property comprised in the will (except an act amounting to revocation as prescribed by the act), prevent the will operating as to such property as the testator

has power to dispose of by will at the time of his death. The effect of this is that a revocation by alteration of estate is abolished, but an act which effects a mere alteration of the estate must be distinguished from an act which takes away the estate altogether. Thus, where A. devised real estate to B., and subsequently contracted to sell that estate, and the contract was uncompleted at his death, it was held that the purchase-money belonged to the testator's personal representatives, and not to B., because at the time of his death the testator had merely a claim for the purchase-money and a lien for it upon the estate, and the court did not consider this an "estate or interest which the testator had power to dispose of at the time of his death." (*Farrar v. Earl of Winterton.*) The clause applies to cases where the testator subsequently to the will merely modifies the ownership of the property, and not where the thing given by the will is altogether gone. (*Moor v. Raisbeck.*)

Revocation may be effected in the following ways:—(1) By marriage; (2) By another will or codicil, or some writing declaring an intention to revoke the same and executed like a will; (3) By burning, tearing, or otherwise destroying the same by the testator, or some person in his presence and by his direction, with the intention of revoking the same.

(1) *Revocation by Marriage.*—The old law was that a will was not, except in the case of a woman's will, revoked by marriage alone, but only by marriage and the birth of a child. Now, however, a simple marriage will revoke a will, unless it be made in execution of a power of appointment, where the property appointed would not, in default of appointment, pass to the testator's heir, executor, administrator, or next of kin. The reason of marriage revoking a will is obvious; the testator by marriage acquires new relations, and the law not unreasonably supposes that the will no longer represents the testator's wishes.

(2) *By another Will.*—The mere fact that there are two wills extant, and that the second begins "This is the *last* will, &c.," and contains no revocation clause, will not effect a revocation of the prior will. (See *Re Petchall.*) To revoke a former will a testator must either revoke it in express terms, or, if it contain no such revocation clause, dispose of the property comprised in the first will in a manner inconsistent with the limitations thereof in

such first will. (See *Henfrey v. Henfrey*.) Of course if the second will deals with part of the property dealt with by the first will in a manner different from that in which it is dealt with by such first will, it will to that extent revoke it, but no further. (See *Plenty v. West*.) “The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the last expressly revoke the former, or the two be incapable of standing together.” (Williams on Executors, vol. 1, p. 165.)

The above remarks will also apply to a revocation by a codicil. A will may also be revoked by “some other writing” declaring an intention to revoke, and executed like a will. A mere written memorandum will not be sufficient; but a letter duly attested, by which the testator directed another person to get his will and burn it, was held to satisfy the section and amount to a revocation. (*Re Durance*.)

(3) *Revocation by Destruction*.—A will may also be revoked by “burning, tearing, or otherwise destroying the same.” The first point to notice hereon is, that the act does not speak of cancellation: so that to draw one’s pen through the will, through the testator’s signature, the attestation clause, and the names of the witnesses, will be of no avail in the way of effecting a revocation. (*Stephens v. Taprell*; *Re Brewster*; *Cheese v. Lovejoy*.) As to destruction of a will, difficult questions have arisen as to the effect of a partial destruction, and as to what amounts to evidence to show that a destruction has been effected with an intention of revoking. Suppose the will to have been wholly destroyed; this will generally amount to revocation, but not always; for the destruction must be made *with the intention to revoke*. So that if it be destroyed by mistake (*Re Thornton*), or in a fit of madness (*Re Downer*), or under the false impression that it is invalid (*Giles v. Warren*), probate will be granted in such cases of a copy, or a draft. Again, the doctrine of dependent relative revocation applies here, *i. e.*, the doctrine that if a will be revoked by mutilation or destruction, either with a view to the execution of a new will which is not executed (*Elms v. Elms*), or because the testator erroneously supposes that he has executed another will (*Onions v. Tyrer*; *Dancer v. Crabb*), or with the incorrect idea that a will subsequently made is well executed and valid (*Scott v. Scott*), no revocation of the prior will will ensue. The rule was thus put by Sir J. Hannen in

Dancer v. Crabb: "If the testator's act can be thus interpreted, 'Whatever else I may do I intend to cancel this my will,' the will is revoked. But if his meaning be, 'As I have made a fresh will my old one may now be destroyed,' the old will is not revoked if the new one is not in fact made."

The will must be destroyed to some considerable extent; there must be such an injury with an intent to revoke as destroys the entirety of the will. Thus, where the testator, intending to revoke his will, threw it in the fire, but it was snatched off against his wishes, and taken away with the corner of the envelope in which it was contained scorched only, this was held not to amount to a revocation; for the will itself was not destroyed in any of the ways indicated by the statute. (*Read v. Harris*.) The least amount of tearing will revoke the will if it be done *animo revocandi*. (*Price v. Powell*.) Tearing off the signature and attestation clause, or the names of the witnesses alone, has been held to amount to revocation. But to cut off the signature of one of the witnesses, for the purpose of having it rewritten, is not revocation, as the *animus revocandi* is not present. (*Re Tozer*.)

It is now settled that an act which may amount to destruction of a will does not also amount to a destruction of a codicil thereto. The codicil is an independent instrument, and must be revoked in some of the methods prescribed by the Wills Act, just as if it were itself a will. (*Re Savage*.)

The destruction must be effected in the presence of the testator as well as by his direction; so that, even though it be burnt by his direction, if he is not present at the burning, a draft of the will will be admitted to probate. (*Re Dadds*.) Thus, too, a direction by a testator that his will shall be destroyed in his lifetime or after his death is inoperative. (*Stockwell v. Ritherden*.)

When a testator is known to have executed a will, and it is not forthcoming at his death, the law will presume that he has destroyed it with the intention of revoking it. (*Patten v. Poulton*.) This presumption may, however, be rebutted by evidence negating it. (*Whitely v. King*.) If a will is found in an incomplete state the same presumption will arise. (*Williams v. Jones* and *Re Gullan*.) In a case, however, where a will was found in the coal cellar, with the following words indorsed, "This is revoked" (no signature or attestation to these words appearing), it was held that the will was

not revoked, for here, though the intention to revoke might be, and was, clear, yet there was no destruction of the will. A will may be, of course, lost or destroyed without the intention of revoking it, and in such cases a draft or copy of the will, if one exist, or, if these do not exist, the contents of the will, may be proved by the recollection of persons who heard it read over, even though they may be interested under it. (See *Sugden v. St. Leonards*.) And in a recent case (*Goulstone v. Woodward*), it was held that it was not even necessary to give evidence of what were the contents of a lost will as seen after execution, but evidence was admitted showing what the deceased had expressed to be his intentions, and that the deceased had announced his design of making a will in accordance with such intentions, and it was shown that he had afterwards declared he had made such a will, but there were special and peculiar circumstances in this case, and possibly it may not be followed.

But proof will have to be given of the loss or destruction of the original will, of its due execution, of its existence at a period subsequent to the death of the testator, and an explanation given of the circumstances attending its alleged destruction or loss. (See *Burke v. Burke*.)

V. Revival of Revoked Wills.

By sect. 22 of the Wills Act, no will or codicil which has been revoked can be revived otherwise than by re-execution thereof, or by a codicil properly executed, showing an intention of reviving the same. And further, when any will or codicil has been partly revoked, and afterwards wholly revoked, and is then revived, the revival is not to extend to that part thereof which was revoked before the revocation of the whole, unless the contrary is shown. The intention to revive must be deducible from the codicil itself, and not from extraneous circumstances. (See *Marsh v. Marsh*.) Thus, a duly executed will revoked by a second will is not revived by the destruction of the second will, and no parol evidence will be admitted to show an intention to revive the former will. (*Stride v. Sandford*.) Nor can a will which has been revoked be revived, unless it is in existence at the date of the revival, and it must be clearly identified. (*Newton v. Newton*.)

VI. Alterations and Obliterations in Wills.

By sect. 21 of the Wills Act, no obliteration, interlineation, or other alteration made in a will after its execution will have any effect (except so far as the words or effect of the will before such alteration is not apparent), unless the alteration be executed like a will. But the will, with such alteration as part thereof, will be deemed duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will, opposite or near such alteration, or at the foot, or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will. The presumption of the law as to the time when an alteration was made is that it was made *after* the execution of the will. (*Burgoyne v. Shouler*; and see also *Cheese v. Lovejoy*.) And where there is a codicil to a will, the presumption is that alterations in the will were made *after* the execution of the codicil. (*Lushington v. Onslow*.) An alteration will not be incorporated in the probate of a will, even though there be a written memorandum by the testator in explanation of it, if such memorandum be unattested. (*Re Brooke*.) But it would seem that evidence may be given to show that the alteration was made in fact before the execution, as where there was a holograph will, and an expert gave in evidence his opinion that the alterations appearing therein were written at the same time as the date of the will. (*Re Hindmarsh*.)

As to obliterations, the words originally written must be entirely obliterated, so as not to appear on the face of the will, or effect will be given to them as if they had not been attempted. And it is allowable to make use of magnifying glasses to ascertain whether they are apparent or not, and also to take the evidence of experts, *e. g.*, of engravers, &c. (See *Cooper v. Beckett*.) But a sufficient obliteration may be made by pasting paper over the words which it is proposed to obliterate, and the court will not authorize the removal of the paper, so as to discover what the words written underneath are. (*Re Horsford*.)

The doctrine of dependent relative revocation seems to apply to obliterations; so that where a testator gave a legacy in his will, and afterwards completely erased the words showing its amount,

and substituted a different amount (which substitution, being unnattested, did not of course take effect), it was held that the obliteration did not revoke the legacy, though its amount was no longer apparent, and parol evidence was admitted to show what the original amount was. (*Brooke v. Kent*; see also *Re McCabe*, where the testator completely erased the name of a legatee and substituted the name of another person. It was held that as he made the alteration on the supposition that he had effectually substituted the new legatee, the original legatee's name would be restored.)

As we have said before, alterations in a will are deemed to have been made *after* the execution thereof, even if the will has been followed by a codicil. To incorporate the alterations, the codicil should expressly refer to them. It is sufficient, however, on making an alteration, to place the name or initials of the testator and witnesses in the margin of the will near the alterations. The signature of the witnesses alone is not sufficient, even if accompanied by the retracing of the testator's original signature with a dry pen. (*Re Martin*.)

Evidence is admissible to rebut the presumption, and show that the alterations were made before execution. For this purpose, the declarations of the testator will be admitted if made *before* the execution of the will (*Johnson v. Lydford*); but not if made after the date of the will. (*Doe v. Palmer*; see *Dench v. Dench*.) But declarations made after the execution of a will, as to alterations therein, were admitted when there was a codicil to the will, and such declarations were made before the execution of the codicil. (*Re Sykes*.) The declaration to be admissible must not be a mere general one that there have been some alterations made; it must clearly identify the particular alterations made. (*Williams v. Ashton*.)

VII. The Time from which a Will speaks.

As to the date from which a will speaks and takes effect, sect. 24 of the act provides that it shall so speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will. This provision only relates to the effect of a disposition of property by the will, and

will not, for instance, render valid a will executed by a testator during his minority, and who afterwards attains majority before his death, or a will made by a married woman of property which she has no power to dispose of during coverture, and who afterwards dies a widow. (See *Noble v. Willock*.) The principle of this case has been recently applied, in *Stafford v. Stafford, In re Mrs. Price*, to the will of a married woman made under the provisions of the Married Women's Property Act, 1882. In this case Mrs. Price made her will on January 19, 1884, containing a residuary gift in favour of A. and B. On January 26, 1884, her husband died, having by his will given to his widow, Mrs. Price, certain property. Mrs. Price died on January 29, 1884, without having re-executed her will. The question arose whether the property acquired under the husband's will would pass to the residuary donees A. and B. Mr. Justice Pearson held that, as the Act of 1882 only allowed a married woman to dispose of her separate property as a *feme sole*, and as what she obtained under her husband's will was not separate property, since she was no longer a married woman, Mrs. Price's will did not pass the property acquired by her under her husband's will. This decision has been since followed by the same judge in *Re Young*, but it must be regarded as questionable whether, regard being had to the spirit in which the Married Women's Property Act, 1884, was enacted, the decisions will be upheld by the Court of Appeal, should they reach—as it is very desirable they should reach—that court.

What is a contrary intention within the section? Suppose the testator devises all his property of which “*I am now seised,*” will the word “now” refer to the date of the will, or be considered as having been written immediately before his death? In *Cole v. Scott* it was held that it referred to the date of the will; but here the word “now” was used in other parts of the will with clear reference to the date thereof. The general rule is that the use of the word “now” will not alone be deemed to refer to the date of the will. (See *Wagstaffe v. Wagstaffe*; *Castle v. Fox*.)

A gift of “My new 3½ per cent. annuities” has been held to pass all the annuities of that description which the testator possessed at the time of his death (*Goodland v. Burnett*), and a gift of all the money which the testator has in a certain bank will pass all the money which he has in that bank at his death. (*Hepburn*

v. *Skirving*.) On the other hand, a devise of "All my Quendon Hall estates in Essex," was held not to pass additions made thereto after the date of the execution of the testatrix's will, and this, though she had contracted to purchase some of such additions before the date thereof. (*Webb v. Byng*.) In this case extrinsic evidence was admitted to show what the testatrix meant to be comprised in the designation she had used. Further, where there is a devise of specific leaseholds, and the testator afterwards acquires the freehold reversion, the fee simple will pass to the legatee (*Miles v. Miles*), unless it can be gathered from the will that the testator only intended to deal with leaseholds. (*Pierce v. Harrison*.) Lastly, it has been held, that the will of a testator who afterwards becomes a lunatic speaks from its date, and not from the death of the testator. (*Wheeler v. Thomas*.)

By sect. 25, when a devise fails by reason of the death of the devisee in the lifetime of the testator, or because it is contrary to law, or otherwise incapable of taking effect, the property comprised in the devise will be included in the residuary devise, if there be any in the will. This section, however, does not probably apply to cases where the testator exercises a power of appointment, general or specific, by will, and the appointee dies before him; in such a case the claim of the persons entitled in default will probably prevail.

VIII. What Property will be included in a General Devise.

By sect. 26, a general devise of lands will include not only freehold, but leasehold and copyhold land, unless a contrary intention appear. Under this section it has been held, that where there is a gift of all the personalty to A. and all the lands to B., the leaseholds, though strictly speaking personalty, will pass to B. (*Wilson v. Eden*.) Had the word "freehold" been prefixed to the general devise of the lands, however, this would not have been the case. (*Stone v. Greening*.) Again, where a testator charged an annuity on his real estate, but he had no land, except some leaseholds for long terms, it was held that the leaseholds were charged. (*Sully v. Davis*.) And leaseholds will pass under the description of the testator's real estate in a particular place. (*Morse v. White*.)

If, however, there is a devise of the testator's "real estate" (as

distinct from a devise of "lands") to A., and of his "personal estate" to B., leaseholds would apparently (for there is no direct authority on the point), pass to B., and not to A. (See *Turner v. Turner*; *Wilson v. Eden*.) Trust and mortgaged estates used to pass under a general devise in the absence of a contrary intention. (See *Braybrooke v. Inskip*.) But now, by sect. 30 of the Conveyancing Act, such estates do not pass either under a general or specific devise; but notwithstanding any such devise such estates vest in the personal representatives of the deceased mortgagee or trustee, and this section applies equally to copyholds as to freeholds. (See *In re Hughes*, and *post*, p. 474.) Again, by sect. 27, a general devise of the real estate, or a general bequest of the personal estate, will pass real estate or personal estate over which the testator has a general power of appointment, *i. e.* power to appoint in whatever manner he may think proper, unless a contrary intention appear by the will. (See *In re Clarke's Estate*.) To show a contrary intention there must be something in the will inconsistent with the view that the general devise or bequest was meant as an execution of the power. (*Scriven v. Sandon*.) A will speaks from the death of the testator, as we have seen, so that no contrary intention can be deduced from the fact that the will was executed before the testator received the general power to appoint. (*Stillman v. Weedon*; *Boyes v. Cook*.) But other circumstances will be taken into consideration. Thus, where the testator subsequently to his will made a settlement by which he gave to himself a power to appoint certain property, it was held that a residuary bequest in his will did not operate to execute that power, a contrary intention being deduced from the fact of his reserving the power to appoint subsequently to the execution of his will. (*Re Reading's Settlement*.)

The section does not apply to special powers. (See *Hope v. Hope*.) But it has been held that general gifts to the objects of a special power operated to amount to an execution of a power to make an appointment in favour of those objects. (See *Re Tempest's Trusts*; *Davies v. Davies*.) We may note incidentally that the effect of exercising a general power of appointment by will is to make the property appointed assets for the payment of the testator's debts whether the appointor be a man (*Fleming v. Buchanan*), or

a married woman. (*Re Harvey; Hodges v. Hodges; Married Women's Property Act, 1882, s. 4.*)

IX. The Effect of a Devise without Words of Limitation.

By sect. 28, such a devise will pass the fee simple, or other the whole estate or interest which the testator has power to dispose of by will, unless a contrary intention appear in the will. This only applies to estates previously existing, and not to those created by the will itself, so that if a testator creates an annuity by his will and bequeaths it to A., A. will only get an annuity for his life. (*Nicholls v. Hawkes.*) A devise of rents and profits will, under this section, pass the fee simple in the land out of which they arise. (*Mannox v. Greener.*)

It may be here noticed that, even prior to the Wills Act, 1837, the word "heirs," which was essential in a deed to create a fee simple, was not necessary in a will, but some words had to be used to show the testator's intention, such as "in fee simple," "for all the estate of the testator," to A. and his assigns for ever. To create a "fee tail" estate proper words of procreation to show the intention were always necessary, and must still be used, such as "heirs of the body," "issue," "heirs male," "in fee tail," or "in tail."

X. The meaning of the Words "Die without Issue."

By sect. 29, the expression "die without issue," "die without leaving issue," or "have no issue," or other words importing either want or failure of issue of any person in his lifetime or at his death, or an indefinite failure of issue, shall be construed to mean want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of issue, unless a contrary intention appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being (without any implication arising from such words) a limitation of an estate tail to such person or otherwise. But the section is not to extend to cases where such words import that if no issue described in a preceding

gift shall be born, or if there shall be no such issue which shall live to attain the age or otherwise answer the description required for obtaining a vested interest by a preceding gift to such issue.

Before the act a gift of realty and personalty to A., and if he should die without issue to B. in fee, would give to A. an estate in tail in the real estate, and an absolute interest in the personal estate; for the words "die without issue" were construed to mean an indefinite failure of issue, and, therefore, the gift over to B. was void as offending the perpetuity rule as far as the personalty was concerned; and as to the realty, as A. could at once bar the estate tail, and acquire the fee simple, B. ran the risk of being totally defeated, even though A. were to have no issue. If, however, the limitation of *personalty* was to A., and if he dies without *leaving* issue, to B., the courts held that in such a case the personalty would go to B., if A. died leaving no issue. (*Forth v. Chapman.*) By virtue of the above section, A. will now take a fee simple in the real, and an absolute interest in the personal estate; but this estate and interest will be liable to be defeated by his dying without leaving issue living at his death, and, if this occurs, B. will become entitled as executory devisee and legatee, A. having no power to defeat the gift to him.

The provision in the Wills Act as to *lands* must now, however, be read subject to sect. 10 of the Conveyancing Act, 1882, under which the gift to B. becomes void, directly any of A.'s issue attained twenty-one.

The section in the Wills Act has been held not to apply to a case where property was devised to A., with a limitation over "if he should die without issue or under twenty-one." Here "or" was read "and," and A. obtained the fee upon his attaining twenty-one. (*Morris v. Morris.*) Again, where there is a gift to A. and the heirs of his body, and if he should die without issue to B., here A. will take an estate tail, which he may bar, and thus defeat B. (*Green v. Green ; Dawson v. Small.*)

XI. The Amount of the Estate which Trustees will take under various Circumstances.

Sect. 30 of the act provides that, if real estate be devised to trustees without an express limitation of the estate to be taken by them, and the beneficial interest in the estate, or surplus rents and

profits thereof, is not given to any person for life, or if such interest is given to some person for life, but the purposes of the trust may continue beyond the life of such person, such devise will vest the fee in the trustees, and not a mere estate determinable when the purposes of the trust have been satisfied.

The old doctrine was, that if there were no words of limitation the trustees took no greater estate than was sufficient for the purposes of the trust, and this doctrine resulted in much confusion, as it was impossible to say what amount of estate the trustees took in any particular instance.

XII. When a Lapse of a Devise or Bequest occurs.

As you know, the rule as to lapse is, that when a gift is made by will, and the object of that gift dies in the lifetime of the testator, the gift fails. By sects. 32 and 33 of the Wills Act, two exceptions are created to this rule. First, there will be no lapse where a person to whom an estate tail has been devised dies in the lifetime of the testator leaving issue, if such issue be living at the death of the testator, but the devise will take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will. Secondly, the same result will follow, if a child or other issue of the testator to whom property is devised or bequeathed dies in the lifetime of the testator, leaving issue who survive the testator.

The result of the peculiar wording of the section as to gifts to issue is, that the devisee or legatee may make a will disposing of the property given to him, and such will will be operative, though he die before the testator, provided he die leaving issue. (See *Johnson v. Johnson*.) It is not necessary [that the issue of the legatee, who was alive at the death of the testator, should be the same issue who is alive when the legatee died. If any of his issue is alive at the testator's death no lapse will take place. (*Re Parker*.) The section does not apply to gifts to a class; so that if there is a bequest to the children of the testator living at his decease, and one of those children predeceases the testator, leaving issue, the issue of such child will take nothing; but the other children alone will be entitled. (*Fulford v. Fulford*.) Nor does the section

apply to cases where the testator is exercising a special power of appointment. So that if A. has a power to appoint a sum of money to each of his children, and he exercises the power in favour of a child, and that child dies in A.'s lifetime leaving issue, the appointed gift will lapse, notwithstanding this section. (*Holyland v. Lewin.*) But the section does apply when a general power of appointment is exercised in favour of a particular child (*i. e.* a child referred to by name). So that if such child dies before the testator, leaving issue living at the testator's death, the gift does not lapse, but takes effect as if the appointee had died immediately after the testator. (See *Eccles v. Cheyne.*) For some curious results arising under this section reference may be made to *In re Jones*, *Jones v. Hensler*, and *Eagar v. Furnival*.

In the former case, A. devised a freehold house to his son B., and left the residue of his realty to C. and D. B. made his will, giving all his property to his father. B.'s will contained no residuary gift. B. died in A.'s lifetime leaving issue who survived A. And it was held, that as under the Wills Act it had to be presumed that the father's death occurred before the son's, the son's gift to the father lapsed, and that therefore E., the heir-at-law of B., was entitled to the property.

In the latter case (*Eagar v. Furnival*), property was devised by A. to his daughter B. B. died in A.'s lifetime leaving issue living at A.'s death, and it was held, that as under the Wills Act it must be presumed that B. had died immediately after A., she was sufficiently seised of the lands to give her husband the right to an estate by the curtesy in them.

CHAPTER II.

THE CONSTRUCTION OF WILLS.

BEFORE you can be considered competent to draft a will, so that it shall put into clear and unmistakable language the intentions of your client, it will be necessary for you to have a full knowledge of the general rules which are applied in the construing of wills, and also of the meaning which has been attached by the law, as appearing from various decided cases, to particular words, expressions or phrases in wills. As we have seen, some rules of construction are to be found in the Wills Act; but there is an innumerable host of other rules which have been from time to time laid down by the courts in the cases which have come before them. It may be true that each will is to be construed by itself, and not with reference to other wills; but other decisions will be referred to in order to see in what manner the principles of reasonable construction have been applied by judges of high authority in cases more or less similar. (See *Waite v. Littlewood*.) We propose, then, in the first instance, to mention some of the general rules which have been established for the construction of wills, and then to examine a few of the words and expressions most frequently occurring in wills, in order to see what interpretation has been given to them by the law.

I. General Rules of Construction.

The first rule which we may mention is the one which regulates the construction of wills in every case, and is the rule that everything possible shall be done to effectuate the intention of the testator, so far as such intention is consistent with the rules of law.

But intention here means the intention as appearing from the express words of the will, or from implication from the words used therein. Intention must not be imputed by mere uncertain conjecture, contrary to the express words, especially when the will has

been drawn by a person skilled in the practice of conveyancing. (See *Egerton v. Earl Brownlow*.) You will not be allowed to adduce extrinsic evidence to show what the testator meant, except in one case—where there is a latent ambiguity—*i. e.* where the ambiguity does not appear on the face of the will itself, but it is only apparent when it is attempted to give effect to it. Thus, where a testator gives a legacy to a person called A. B., and there are two persons answering to this description, extrinsic evidence will be admitted to show which of those two he intended to benefit, if the will affords no ground for preferring either. Thus, in *Charter v. Charter* the testator appointed F. C., his son, to be executor and general devisee of his will. At the date of the will he had no son F. C., but he had two, named W. F. C. and C. C., and W. F. C. was never called F., but always W. Here evidence was not admitted to show that the testator had meant C. C. to be executor and devisee. The court held, on the consideration of the whole will, that there was sufficient therein to show whom the testator had intended to prefer, and decided that C. C. was the person intended by the testator to occupy the position he had assigned to F. C. But where nothing can be gleaned from the will itself to throw light on the ambiguity, then parol evidence will be received. Thus, if a legacy is given by will to the testator's nephew, A. B., and it happens he has a nephew so named, but that he has another nephew, B. B., whom, however, he has been accustomed to style A. B., evidence would be admissible to show that he meant to benefit B. B., and not A. B. (See *Reynolds v. Whelan*.) But you must remember that, in general, extrinsic evidence is not admissible to affect the construction of a will. Thus, suppose there is a reference in a codicil to a revoked will, but nothing on the face of the codicil to show an intention to revive the will, extrinsic evidence will not be allowed to show that the reference to the will was meant by the testator to amount to a revival of it. (See *Re Steele*.) Nor, if a devise or bequest is inadvertently omitted, can parol evidence be given to supply it, or show that it was intended. (See *Mitchell v. Gard*.) Again, where a legatee is once correctly named and described in one part of the will, and the same name occurs again in another part as a legatee without any description, evidence will not be admitted to show that a different person was intended. (*Webber v. Corbett*.) As to the admissibility of extrinsic evidence generally, you should refer to

Wigram on Extrinsic Evidence, or Hawkins on the Construction of Wills, and the notes to the leading case of *Doe d. Hiscocks v. Hiscocks*. We must content ourselves with mentioning the following brief rules concerning its admissibility :—It will be admitted to rebut presumptions of law or equity, as the presumptions in favour of satisfaction, of resulting trusts, and of ademption of legacies by portions, &c., to explain the meaning of signs or symbols, or nicknames used by the testator, to show that the will was executed on another date than that appearing on the face thereof. But it is not admissible to substitute one word for another, to enlarge the extent of terms, or to affect the construction of words, unless the context renders it impossible to accept the words in their ordinary sense.

In endeavouring to ascertain the intention of the testator the whole will must be looked at, and not merely particular expressions or detached passages. An intention so gathered will be strong enough to overcome the strict or literal meaning of the terms used by the testator, if the strict meaning would obviously frustrate the intention. (See *Abbott v. Middleton*.) But if the testator uses words which have a technical meaning, the technical meaning will be given to them, unless the testator has by his will beyond all doubt excluded the technical construction of them. (See *Toums v. Wentworth* ; *Gordon v. Gordon*.)

When the words of the will may be fairly construed in two different ways, the more probable of the meanings will be put upon them. Thus, if one of the constructions would defeat while the other would effectuate the testator's intention, that will be adopted which will tend to carry out the intention.

Words will sometimes be rejected, supplied or changed, when this is absolutely necessary to give effect to the general intention as collected from the whole will. But words will not be inserted or struck out, or in any manner altered, if they are clear and unambiguous, upon mere conjecture, or on the mere ground that the devise seems capricious, and that a gift in other terms would be in conformity with other dispositions in the will. Words will also be transposed, where necessary, to make sense and give effect to the will. Mistakes, however, will never be presumed if a reasonable construction can be found out.

If two parts of a will are totally inconsistent and irreconcilable,

the latter will prevail on the principle that the testator may have changed his mind, but where a benefit is conferred in one part of the will in clear terms, which admit of no doubt, such benefit cannot be afterwards taken away, except by words which are just as clear and free from doubt. Thus, where there was a gift to children "except Thomas, the eldest son," and the eldest son's name was not Thomas, the exception was held void. (*Hodgson v. Clark.*)

Where it is impossible to discover from the words of a will what was meant to be given, or the person to be benefited, the will will be void for uncertainty. Thus, if there is a gift by name and a particular description superadded, and there is some one who answers to the name, and some one who answers to the description, no evidence of the testator's intention will be admissible, and the gift will be void for uncertainty. So, also, it will be if there is nothing to point to one person more than another. (*Drake v. Drake.*)

II. Construction of particular Phrases.

Such are some of the general rules which are laid down for the construction of wills. We will now proceed to enumerate some of the meanings which the courts, following out these rules, and chiefly the rule that the testator's intention shall be effectuated, have put upon particular words, expressions or phrases, dividing them into words, &c. connected with the descriptions of persons, and words, &c. connected with descriptions of things.

(a) *As to Descriptions of Persons.*

Where a gift is made to a person as filling a certain character, the fact that he does not fill that character will not avoid the legacy unless the character was fraudulently assumed in order to deceive the testator. (*Wilkinson v. Joughin.*) A gift to the wife of A. means the wife which A. has at the date of the will, and no other, if A. has a wife living at the date of the will. (*Burrough's Trusts.*) Formerly a gift to husband and wife, and a third person, conferred one-half the property on the wife and husband, and the other half on the third person, husband and wife being considered as one. And this was held to be the case where the will was made before the Married Women's Property Act, 1882, but the testator

died after the act came into operation, *i. e.* after 31st December, 1882, though in this case the wife took her share under the Act of 1882 for her separate use. Had the will been executed after the above date the effect of the will would have been to give the husband a third, the wife a third, and the third person the remaining third in the property, for the will would be construed for all purposes as if the wife were a *feme sole* under the provisions of the M. W. P. Act, 1882.

When a gift is made to persons who shall be “unmarried” at a certain time, it depends on the circumstances of each particular case what meaning shall be given to the word, whether it shall mean without ever having been married or not having a husband or wife at that time. (See *Thistlethwayte’s Trusts*.)

Gifts to Children.—A “child” *prima facie* means a “legitimate child,” and in a gift to children generally, evidence will not be admitted to show that the testator may or must have meant illegitimate children. (*Durrant v. Friend*.) But illegitimate children may take if they have acquired the reputation of being the children of the person named in the gift; if, for instance the bequest is to “the children of A. now living,” and A. has no legitimate children, or if A. is dead and has only had illegitimate children. (See *Docer v. Alexander*.) But in a gift to children of a living person, illegitimate children will not be included, even though such person has only illegitimate children at the date of the will, and at the testator’s death there is no possibility of others. (*Dorin v. Dorin*.) But a testator may show on the face of his will that he intends illegitimate children to take, and if he does so they will not be deprived of their benefits. Thus if they are specially mentioned by name, or if to a gift to children generally there is added a mention of the illegitimate children by name, they will take. Again, if property is given “to my daughter A., the wife of B., and then for the children of my said daughter,” and A. and B. are so related that they cannot by any possibility have legitimate children, the property will go to their illegitimate children, if any (*Hill v. Crook*), unless A. and B. may lawfully marry and have legitimate children. (*Re Ayler*.) As to gifts to future illegitimate children, these were formerly void in all cases; but it was settled in *Occleston v. Fullalove*, that a gift may be made to a bastard unborn at the date of the will, but born or *in ventre sa mère* at the testator’s decease.

(See also *Ellis v. Houston*; *Re Humphries*.) There seems to be still some doubt about the subject, however, and the safest plan to provide for such children is to execute a codicil after the birth of each child making such provision as may be intended for them.

Under a gift to children the children of a former marriage will take unless there is apparent an intention to exclude them (see *Lovejoy v. Crafter*); so also will children by a subsequent marriage in the absence of such intention. But under such a gift grandchildren will not take except in the case of a gift to the children of a person deceased who has only grandchildren at the time of the gift. (*Berry v. Berry*.) Again, children already born will take under a gift to children "hereafter to be born," or "that may be born" (*Hebblethwaite v. Cartwright*); and a gift to children "surviving me" will not exclude those born after the testator's decease. (*Re Clarke*.)

Gifts to Children as a Class.—When an immediate gift is made to the child of any person the class of children to take will be those existing at the testator's death, including a child *in ventre sa mère*. If there are no children then existing, those coming into existence subsequently will take. If the gift is not to take effect till after it has been enjoyed by a tenant for life, the class will include children born in the lifetime of the testator, and coming into *esse* before the tenant for life dies; but if no children are born before the death of the tenant for life, after-born children will be admitted, unless the testator's intention is clear that the distribution is to be made once for all when the fund falls into possession. If the gift is of a reversionary interest the class will be ascertained when the interest falls into possession. Suppose the gift is to children to be paid at twenty-one, or to such children who attain twenty-one, the class of children will be fixed at the testator's death, if any child has attained twenty-one in the testator's lifetime; if none has, then all born at the testator's death and coming into existence before the eldest attains twenty-one will take. But if the gift is of a distinctive legacy to each of several children, the class to take is fixed at the death of the testator, whether possession is postponed to twenty-one or not. And in a gift to children who attain twenty-one after a prior life interest only, those will take who are *in esse* at the death of the tenant for life, or when the eldest attains twenty-one, whichever happens last. (*Clarke v. Clarke*.)

These same rules will be applied to ascertain the class of children who are to take under a power when there is a gift to children as A. may appoint, and there is no gift in default of appointment and no appointment is made.

These rules for ascertaining the period at which the class of children is to take will not be altered by the mere addition of words of futurity, at least where the distribution is to take place at some period subsequent to the death of the testator. Thus, if there is a bequest to children "begotten" or "to be begotten" or "who may be born," only children will take who are born after the date of the will, and before the death of the testator, and not children born after his decease. (*Stoors v. Benbow.*) The rule is the same where the gift is after a life estate or to children "now born" or "those who may be born hereafter, who shall attain twenty-one." (*Iredale v. Iredale.*) But in the case of an immediate devise to children "to be born hereafter," all children who ever come into existence will take. (*Mogg v. Mogg.*) This will also be the case in a bequest of personalty, unless there is a gift of a lump sum to each of the children begotten or to be begotten. For here the distribution of not only what the children are to take, but of the whole of the estate, would be indefinitely postponed, and it will not be presumed that this was the testator's intention. (See *Butler v. Lowe.*) In such a case the class will be restricted to those *in esse* at the death of the testator.

When a gift is made of personal estate to two or more persons as tenants in common, with a declaration that on all or any of their deaths before a stated time their respective shares shall be equally divided between their respective issue, and they die before the arrival of that time, leaving children, these children will take their shares *per stirpes*, *i. e.* the fund will be divided into as many shares as there were tenants in common, and the issue will divide among them equally the shares of their respective parents. Thus, if there were three tenants in common, A., B. and C., and A. left three children, B. two, and C. one, the fund would be divided into three, and A.'s children would each take one-third of the third share of the fund, B.'s children one-half of such third share, and C.'s child the remaining third thereof. If there had been a special direction that the issue of the tenants in common were to take *per capita*, then the fund would have been divided into six parts and each child would have received one-sixth.

If there is a gift to A. and B. as tenants in common for their lives, and at their deaths to the children and grandchildren, the children will take *per stirpes*, *i. e.* whatever the number of the members of each family may be each will divide between them the share of their parent; but the grandchildren will take *per capita*, *i. e.* they will take the fund after the death of their parents in shares according to their number. (*Barnaby v. Tassel*.) But if the gift to the children is not till after the decease of the survivor of the tenants for life they will take *per stirpes*. (*Malcom v. Marston*.)

Gifts to Nephews and Nieces.—A nephew or a niece means *primâ facie* the child of a brother or sister. But if at the date of the testator's will and at his death he has no nephew of his own, and there are nephews and nieces of his wife, they will take under this designation, and evidence that they were not intended will not be admitted (*Wells v. Wells*); and they may take by name and under the description of nephews and nieces where it appears from the circumstances that they were intended to take, even though there be nephews and nieces of the testator himself of the same name. (*Grant v. Grant*.) Great nephews and nieces will be included where the intention is evident. (*Re Blower*.)

Gifts to Cousins.—Cousins means "first cousins" in the absence of a different intention.

A first cousin is the child of an uncle or aunt, while a second cousin is one descended from the same great-grandfather or great-grandmother. The children of first cousins stand to each other in the relationship of second cousins; but the children of a testator's first cousin stand to him in the relationship of first cousins once removed. As a rule, under a gift to a testator's first and second cousins, first cousins twice removed will not be entitled.

Gifts to Grandchildren.—In the absence of intention to the contrary, a grandchild will not include a great-grandchild. The word "issue" is a term of vague import. It may mean children, grandchildren, &c., but its extent will always be controlled by the context. Thus, if the testator directs that the issue are to take the parents' share, it will be confined to the more restricted meaning

of children. (See *Martin v. Holgate*; *Macgregor v. Macgregor*.) But a gift to the issue lawfully begotten of A. will not necessarily confine the gift to A.'s children. (*Jones v. Evans*.)

Gifts to Relations.—The words “relations” or “near relations,” too, are terms of very indefinite meaning. In the absence of anything to extend their meaning, they will only comprehend those who would have a claim as next of kin under the Statute of Distributions, and they will take *per capita*. The expression will be further restricted by the use of the adjective “poor,” and in such a case only those who could take under the Statute of Distributions, and who are also in want of assistance, will take. Further, the term will only comprise blood relations, and not relations by affinity, or illegitimate relations. The meaning of the word “family” varies with the context. It is generally construed in a limited sense, and means children. It may, in cases of gifts of personal property, mean “next of kin” where there are no children. (*Re Marton*.) And sometimes when, from the general scope of the will, it is not clear whom the testator meant, a gift to a family will be void for uncertainty. (*Yeap Chean Neo v. Ong Cheng Neo*.)

Gifts to Heirs.—A gift of personalty to the testator's “heir,” or the “heir” of some other person, will vest the gift in such heir, as he takes as having been specially named, or as a *persona designata*. But if the testator's meaning, as apparent from the will, is that he intended to give to the beneficiary an absolute interest, the addition of the word “heir” will not take away from such interest. Thus, if there is a gift to A. for life, and then to his heirs, as he shall give it by will, or if he dies without a will to his right heirs, here A. will take the absolute interest. (*Powell v. Boggis*.) So a gift to A. for life, and then to his heirs, or after his death to his heirs, will operate for the benefit of his personal representatives according to the Statute of Distributions. (*Gittings v. McDermott*.)

Gifts to Next of Kin.—The words “next of kin” do not mean persons who would, in case of intestacy, be entitled under the Statute of Distributions, but those who, whether of the whole or the half-blood, are nearest in degree of personal propinquity, so that

it excludes the children of a deceased brother or sister, if there be a brother or sister living. If there is a gift to the next of kin according to the Statute of Distributions, this will exclude either a husband or wife, and a gift to persons entitled as next of kin, or otherwise under the statute, will not include the husbands of such persons, as a husband "claims by right paramount" independently of any statute. (*Milne v. Gilbert.*)

Gifts to Legal Representatives.—Representatives, or legal representatives, generally means the executors or administrators. But the testator's intention, as derived from the whole will, will here again control the meaning, and gifts to them, or even to executors and administrators, have been held to mean the next of kin under the Statute of Distributions as being the persons who "represent" the testator in a popular sense (*Bridge v. Abbott; Palin v. Hill*), and this will especially be the case where the words "share and share alike," or other like phrases, are used. (*King v. Cleveland.*)

Gifts to Executors.—A gift to executors is a gift to them in that character, and they are not entitled to the legacy if they decline or are incapable to act. But the mere taking out probate will entitle the executor to the gift, unless he acts fraudulently. (*Harford v. Browning.*) When, however, the gift is given to him under the description of "my friend and executor," he will take the gift, though he declines to act as executor (*Bubb v. Yelverton*); this will be the case, too, where a legacy is given to one of several executors, and not to the others (*Cockerell v. Barber*), or if the gift consists of a residue. (*Christian v. Devereux.*) Executors sometimes will, and sometimes will not, take beneficially under a gift to them. If the gift is made to them by name, or subject to certain payments, they will take beneficially, and this even where prior legacies have been given to them. But if there is a direction that they are to retain their costs or to distribute the property as may appear just to them, the inference will be that they were not intended to take beneficially, but as trustees for the next of kin. And where a legacy is given to A., and if he dies in the testator's lifetime, to his executors or administrators, and A. does so die, his executors will take the legacy as executors for the benefit of A.'s

residuary legatees, and not as trustees for A.'s next of kin. (*Clay v. Clay.*)

(b) *As to the Description of the Subject-matter of a Gift.*

We will now turn to words and expressions used in wills to describe things devised or bequeathed, and see what construction has been put upon a few of them most commonly in use by the courts. Generally, it may be said, that where there is a correct and specific description of the property given by the will, a mistake in any additional words will have no effect; but where there is first a general description, and this is followed by other words, these other words may restrict it or explain it, or otherwise modify it. (See *Whitefield v. Langdale.*)

Estate.—The word “estate” used alone will be sufficient to carry both real and personal estate, but the context may control its meaning. Thus, if used in conjunction with the word “effects,” or if the gift of the estate is to trustees on trusts exclusively applicable to personal property, real property will not pass. In *Stokes v. Salomons*, however, where the testator devised and bequeathed his estate and effects to A. to be “paid and transferred” to him on attaining twenty-one, though the words “paid and transferred” would seem to apply only to personal estate, it was held, mainly on account of the employment of the word “devise,” that the copyholds also passed. But a different decision was given in *Coard v. Henderson*, where the word “devise” was not used. The word “effects” will carry the personalty only, unless the testator shows that he has used it in an inaccurate sense and intended to pass realty as well. And a devise of the rents or income of property will pass the fee simple in the land itself. (*Mannox v. Greener.*) If you intend to give the residue of the real, as well as the personal, estate, take care not merely to say “I constitute A. my residuary legatee.” In such a case A. will get only the residue of the personal estate, as the word “legatee” is only applicable to that kind of property. (*Windus v. Windus.*) The context will enlarge as well as restrain the effect of the words used. Thus, the expression “personal estates” has been, in the light of the context, held to include realty. (*Doe v. Topfield.*) With reference to

special descriptions of property, the rule will apply "*falsa descriptio non nocet*," so that where a testator devised lands at S., which "were given me by my brother's will," it was held that the devise was not to be confined to what he had taken under the will of his brother. (*Welby v. Welby*.)

Money.—The word "money" is a very ambiguous word which you should not employ without caution. It will include notes payable to bearer, exchequer bills, bills of exchange indorsed in blank, bank notes, money at a bank on a current account, as well as money on deposit. But it will not include choses in action, such as government securities, promissory notes not payable to bearer, or stock in the funds, unless its meaning is enlarged by the context, or the testator has, at the date of his will and of his death, no money properly so called. (*Chapman v. Reynolds*; *Collins v. Collins*.) But sometimes money will be construed in a large sense, as meaning the residuary personal estate. A gift of "the whole of my money" will, as a rule, only pass money properly so called. But if a direction to pay debts or legacies have been given, and the rest of the money is then given, this will pass the whole of the personal estate. (*Stocks v. Barrei*; *Montague v. Earl of Sandwich*.) In quite a recent case, *In re Cadogan*, under a gift of the "money of which the testator was possessed," all personalty, pure and impure, was held to pass.

"Ready money" will include not only cash in the house but money in a bank payable on demand; but it will not pass notes of hand, promissory notes, or debts due to the testator. (*Re Powell*.)

Securities for Money.—This expression will not pass an account current at a bank, or on deposit there, I O U's, shares, bank stock, mere debts, or a lien for unpaid purchase-money. But under the expression "mortgages or securities for money," the legal estate in the mortgaged premises will pass, whether there are words of limitation or not, unless it is apparent that the money alone is given. (*Re Field*; *Re King*.) It is doubtful if the legal estate will pass when the terms used in the gift are "moneys on security." But it will apparently pass when the donee is to receive money on security, and in all cases where the testator's evident intention was

to place the beneficiary in his own position so as to enable him to compel payment of the debt.

Income of a Fund.—The gift of the income of a fund will carry the *corpus* as well as the income (*Humphrey v. Humphrey*) ; but the bequest of a certain specified sum due upon a particular security will not pass any part of the interest which may be owing at the testator's death or at the date of the will. Yet a bequest of a bond, or money owing on a bond, or of a mortgage, will carry arrears of interest due at the testator's death.

Furniture.—This word *prima facie* means only furniture reserved for domestic or personal use. (*Farrant v. Spencer.*) It will include plate, linen, and pictures, but not wines or books, nor goods in a house of business which belong merely to the business.

Household Goods.—This expression will comprehend all things of the household which are not fixtures, or of such a nature that they are consumed in being enjoyed, or merely articles used in the testator's trade or business.

Household Effects.—This term is of a wider significance, and used in conjunction with household furniture will include such things as wines, &c. Curiously enough a telescope has been held to pass as household furniture, and under a bequest of pictures and books in or about the testator's house, pictures at a dealer's to be cleaned, and books sent to be rebound, though not in the house at the testator's death, have been held to pass.

It would hardly be necessary to say that horses, cows, and sheep will not pass under a bequest of household effects, were it not that the point was raised in the recent case of *Johnson v. Johnson*.

Goods, Chattels, or Effects.—These terms used alone will carry all the personal estate, unless their meaning is limited, as by describing them as goods, &c. in a particular locality or at a particular place, or by prefixing or affixing to them other words. If they follow words of a narrower import they will be confined to mean property *ejusdem generis* with the property previously described, unless the bequest is a residuary one. In this last case, where

there is a gift of "residuary estate" or "personal estate," followed by an enumeration of certain specific articles, they will not lessen the effect of the gift as a residue, but will be considered as a defective enumeration of the articles which the testator thought such residue was comprised of. (See *Dean v. Godson*.) Railway stock will pass under a gift of railway shares (*Morrice v. Aylmer*), but debentures will not include debenture stock. (*Attree v. Hawe*.)

(c) *The Meaning of some other Words and Expressions usually occurring in Wills.*

A gift of a "residue" will pass everything not disposed of, whether the testator has attempted to dispose of it or not, and even where it is of a residue "not otherwise disposed of" it will mean "not otherwise effectually disposed of." (*Green v. Dunn*.) It will include lapsed legacies, &c., unless there is an inference that it was intended that it should not do so. Thus, if the residue given is the residue remaining after the payment of certain legacies, and that is the only residue given, it will not include the legacies if they lapse. (*Easum v. Appleford*.)

In a gift to a class, with a direction that on the death of a member thereof his share shall go over to the others, the word "share" will only include an original share, and not an accruing one, unless the words "and interest" be added, or there be other indications that it was the intention that accruing as well as original shares should go over. (*Douglas v. Andrews*.)

The words "survivor or survivors" must be used with caution. The difficulty which occurs about them may be illustrated by the following example:—Suppose property is given equally among A., B. and C., with a gift over of the shares of any of them dying under twenty-one to the survivor or survivors. A. attains twenty-one and dies. Then B. dies under twenty-one. If the word survivor is to be construed literally, B.'s share will go wholly to C., to the exclusion of the representatives of A. But it might be construed "other or others," and in this case the representatives of A. would take a share. In order to effectuate the intention of the testator the courts will generally hold these words to signify "other or others" when it is necessary to give them that construction to effect such intention. (See *Wake v. Varah*.)

Another question in connection with survivors is, when is the class of survivors among whom property is to be divided to be ascertained? The rule is that this question is to be referred to the period designated for the division of the property. Thus, if property is given to A., B. and C. or the survivors, those will take who survive the testator. If it is given to A. for life, and after the death of A. to B., C. and D. or the survivors, those will take who survive A., unless A. die before the testator, when those who survive the testator will take.

The expression "die unmarried" and other kindred expressions need careful handling. They ordinarily mean, when used in wills, "death without ever having been married;" but may also bear the interpretation "not being actually married at any particular time." The circumstances of each particular case will determine which meaning the expression used is to bear. If there is a gift to A. at twenty-one or on marriage, and a gift over on death, unmarried and without issue, this will mean without ever having been married, and the gift over will be defeated if he has married, but has no wife at the testator's decease. But if A. were already married at the date of the testator's will, the expression could not bear this construction, and the gift over would take effect should he not happen to have a wife at the testator's death, unless circumstances showed that the testator could be presumed to have intended to refer to the legatee's making a second marriage. (See *Crosthwaite v. Dean.*) But in a gift to A. for life, remainder to his children, and if he die unmarried and without issue, to B., here B. will take if A. has no wife living and no children at his (A.'s) death, and not merely in the case of A.'s not marrying at all. (See *Re Sanders.*)

"And" will sometimes be construed "or" in gifts over. Thus, if there is a gift to A., and if he die unmarried and without children to B., here if unmarried be read "not being married at his death," the "and" need not be read "or," as he could not in such a case have children. But if "unmarried" be read "never having been married," "and" will be read "or," so that if he does marry and leaves issue the gift over will not take effect. (See *Bell v. Phyn.*) Sometimes, too, "or" will be read "and." Thus, if property is devised to A. in fee, if she dies leaving lawful issue, but if she dies under age or without leaving issue over, "or" will be

construed "and." So also will it be where there is a devise to A. in fee, and if he dies under twenty-one or without issue.

From the above given selection of cases on the construction of phrases and expressions in wills, you will be able fully to comprehend, that in drafting out a will you must not set down your intentions in writing at random, but must exercise the greatest forethought and care in the employment of every word. You should not rely on the fact that the court is disposed to go to the farthest possible extent to carry out what appears to have been the intention of the testator, and with that object will strain the language used. You should endeavour to make your language so clear, that even to the most technically-disposed mind there can be no doubt as to what your meaning is.

CHAPTER III.

POINTS TO BE REGARDED WHEN PREPARING A WILL.

WE now propose to imagine that you have received instructions from a client to draw his will, and will proceed to point out some of the most important points of law which you must ever have before your mind's eye in preparing it.

I. Clause of Revocation.

It may be well to begin with a clause revoking all prior wills, as it may happen that there are other wills or testamentary papers of your client extant; and, as we have seen, these will be entitled to probate so far as not inconsistent with the will under preparation.

II. The Date of a Will.

A date is not necessary, and parol evidence will be received to assist in determining the period of its execution should any question arise whether it was executed prior or subsequently to another will by the same testator.

III. The Direction to Pay Debts.

A will often commences with a direction to the executors to pay the testator's just debts, funeral and testamentary expenses. This direction is superfluous, as they are bound to pay the debts by virtue of their office. Perhaps, however, the use of the word "just" would prevent the executors from exercising the power which they have of paying debts barred by the Statute of Limitations. (See *Hill v. Walker*; *Stalkschmidt v. Lett*.) A bequest of personalty

for the payment of debts does not prevent the operation of that statute. (*Scott v. Jones.*) But a devise on trust to pay debts would formerly have prevented the statute running as to debts not barred at the testator's death (*Hughes v. Wynne*); though this will not now be the case since the Real Property Limitation Act, 1874. (Sect. 10.)

IV. The Appointment of Executors.

The omission to appoint executors will not invalidate the will, and administration *cum testamento annexo* will be granted. The effect of appointing a debtor of the testator an executor destroys the remedy against him at law for the debt, except as against creditors of the testator; but it does not operate to release him in equity as against legatees. He becomes a trustee of the debt for the persons interested in the estate, and is answerable for it as assets in his hands. An executor has, under sect. 37 of the Conveyancing Act, 1881, full powers to pay or allow debts or claims on any evidence he thinks sufficient, and to compound, &c. therefor.

Though persons under legal disability, except lunatics and idiots, are not incompetent to act as executors, you should not appoint any of such persons to the office. An infant executor, for instance, cannot act till he attains majority, and meanwhile it would be necessary for administration to be granted to his guardian or some other person *cum testamento annexo*. Married women may now, in consequence of the Married Women's Property Act, 1882, accept the office without the consent of their husbands; but they are not, as a rule, desirable executors. It has been held that even a corporation can act as an executor; but it will not be often that your client will require the office to be filled by such a representative.

V. What constitutes a Charge of Debts on the Realty.

As to what will amount to a charge of debts on realty, any intention that the testator's debts should be paid by any other persons than the executors will have this effect. Thus, a general direction that the debts shall be paid will so charge them, unless it

be given to the executors alone. Even in this case the realty will be charged, if at the same time it is devised to the executors, unless it be devised to one only of several executors, or they take unequally, or part only of the realty is given to them and part to someone else. (*Re Bailey*.) When there is a general charge of debts or legacies on real estate, executors have in equity an implied power to sell it and to give valid receipts for the purchase-money, but they cannot convey the legal estate. But, as we have seen, by 22 & 23 Vict. c. 35, s. 16, when there is such a charge, and the real estate is not so devised as that the whole interest of the testator's therein becomes vested in any trustee or trustees, the executors have power to raise money to pay debts and legacies by sale or mortgage. But this power does not render it unnecessary to get in any outstanding subsisting legal estate. A devise or trust for the payment of debts will not raise a trust for the payment of debts barred by the Statute of Limitations before the testator's death. As to those not barred at his death, it will not prevent the statute from running either as to real or personal estate. (Sect. 10 of 37 & 38 Vict. c. 57.)

VI. The Bequest of Legacies.

The next part of a will is generally devoted to the bequeathing of legacies. If the testator has a wife it is generally advisable to make a gift to her of a suitable sum of money to be paid to her as soon as may be after the testator's death, so that she shall not be left in want of ready money. The household furniture and plate, &c., too, may generally be left to her absolutely or for her life, with a direction that on her death or re-marriage they shall fall into the residue or be divided among the children, or given to some particular child. In this last case it is the duty of the executors, in the absence of direction to the contrary, to take an inventory of the household property, &c. so left, in order that when the period for division comes there may be no dispute as to what furniture belongs to the testator's estate, and what to his widow's. Further, it seems to be their duty to insure them; so that if your client for any reason does not wish an inventory to be taken or an insurance effected, he should clearly state the fact in his will.

VII. The carrying on of the Testator's Trade or Business.

Directions may also be given in this part of the will to the executors for carrying on the testator's trade or business. Without such directions they will commit a breach of trust in carrying it on. (*Kirkman v. Boothe.*) And even under such directions they will be personally responsible to the creditors with whom they deal, with the right to recoup themselves out of property set apart by the will for the purposes of the business but not out of the general assets. (*Lucas v. Williams.*) For this reason it is generally the practice to appoint a special executor, and to empower him to carry on the business, such special executor usually being the person for whose benefit the business is to be continued. Sometimes it is directed that only part of the testator's estate shall be employed in trade, and when this is the case that part only will be liable in exclusion to the general assets; while, if the executor employs a larger sum than that authorized, the excess, if he becomes bankrupt, may be proved as a debt under his bankruptcy. (*Ex parte Garland.*)

VIII. The various Kinds of Legacies.

We take it for granted that you are acquainted with the main distinctions between general, specific and demonstrative legacies, and understand that where there is a deficiency of assets the first to suffer is the residuary legatee, then the general legatee, and then the specific and demonstrative legatees together; and also that a specific legacy is liable to be adeemed by the act of the testator in his lifetime, while a general legacy is not liable to ademption; and that a demonstrative legacy will not be lost merely by the fact that the fund out of which it is to be paid does not exist at the testator's death. But it is by no means easy to say in all cases into which class a particular legacy falls, and further, it is sometimes difficult to say what amounts to ademption.

The difficulty of deciding whether a legacy is specific, demonstrative or general arises most frequently in those cases where a sum of money or stock is bequeathed by will. In these cases the legacy will not be specific unless the stock or special sum of money is existing at the date of the will, and it is clear that the testator refers to it as a distinct thing set aside from his general estate and intends that that particular stock or sum shall pass. Thus, a mere

legacy of 1,000*l.* stock is not a specific legacy, though the testator have that exact amount of stock at the date of the will; but if the testator gives a legacy of stock generally and then gives the rest of stock standing in his name, the earlier legacies will be specific. (See *Millard v. Bailey.*) And if the testator directs a purchase of stock to be made, should he not have sufficient stock to answer legacies thereof previously given, this will show that he meant to give something in existence at the time, and will make the legacy specific. (*Townsend v. Martin.*) A gift of “my” stock is a specific gift thereof; so also is the gift of part of a specific sum, or of money out of specific money, or of stock out of specific stock. But a gift of money out of stock is a demonstrative legacy. A gift of 1,000*l.* “of my stock” will be specific, if the testator can be understood as estimating his stock at the value of 1,000*l.*; but it will be demonstrative if his intention appears to have been to have given 1,000*l.* payable out of his stock. (See *Davies v. Fowler.*) Again, a gift of “the” 1,000*l.* out on mortgage is specific; but a gift of 1,000*l.* “now invested” in a certain way will not be so. However, a gift of “1,000*l.* or thereabouts,” invested in a certain way, will be specific, as the testator’s apparent intention is to give the investment rather than the mere sum of money. (See *Kermode v. Macdonald.*)

You should note that a devise of land is specific, even if given by way of residue. (See *Lancefield v. Iggulden.*) But as to personal estate, a mere enumeration of specific things in a residuary bequest will not make a gift of those things specific, unless it is something more than an enumeration, as where the specific things are distinguished from the residue by some such words as “as well as,” “together with,” “or,” and “also.” Thus, if a testator gives “all my leases, furniture, stock-in-trade, and all my estate and effects,” the gift is a whole and entire one, and is residuary. (*Botthamley v. Sherson,*)

The moral to be derived from the above is, that whenever the testator wishes to give a specific legacy, and the nature of the subject-matter of the gift is such that doubts may subsequently arise as to whether the gift is general or specific, you should take care expressly to state that it is given as a specific legacy. As we mentioned above, a specific legacy is liable to be adeemed. What will amount to ademption? Of course, if the subject-matter of the

gift does not exist at the testator's death, there is nothing for the legatee to take, and so he will get nothing, and moreover he will not be entitled to any compensation for his disappointment out of the rest of the testator's general assets. But, further, a specific legacy is adeemed if it is changed by the testator into something else, though that into which it is changed is in existence at the testator's death. Thus, if a man by his will give a debt to A., and the debt is paid in his (the testator's) lifetime, and with the money received he buys a horse, the horse will not pass to A. (Sir G. Jessel, in *Harrison v. Jackson*) ; or, if he gives A. 1,000*l.* consols, and by a codicil states that for such gift he substitutes 1,000*l.* bank stock specifically, and before his death he sells the latter, A. will get nothing, not even the 1,000*l.* consols bequeathed by the will, though they are still extant. (*Marquis of Hertford v. Louther.*) And in the above-mentioned case of *Harrison v. Jackson*, where a testator bequeathed to A. 1,000*l.* of certain railway stock standing in the name of trustees, with which he had power to deal, and which he had intended to transfer into his own name, but before he could do so the stock was redeemed and paid off at par, and the proceeds were invested by the testator in other railway stock ; it was held that A. was entitled to nothing, as the legacy had been adeemed by the change. But a change made in the specific thing bequeathed, which leaves it to all intents and purposes the same as it was before, as where by a resolution of the company shares were converted into stock, will not effect an ademption ; nor, apparently, will a mere change of investment of security on which a fund specifically bequeathed is invested, unless the testator receives the money and invests it, or lends it on security for his own purposes. (*Jones v. Southgate.*) If goods in a particular house or place are bequeathed, and are subsequently removed to another house or place, the gift will not be adeemed if it appear that the goods themselves were meant to form the subject of the bequest, and to be enjoyed without any connection with the place in which they are described as being. But if the intention seems to be that the goods were to be enjoyed in connection with the place in which they are said to be, as where both goods and house are given to the legatee, the permanent (but not the mere temporary) removal of them to another place will effect an ademption. (*Spencer v. Spencer.*)

In connection with specific legacies of personalty, note that the

legatee is entitled to receive the legacy freed from all liabilities created by the testator, so that if the testator has pledged it, the legatee is entitled to compensation out of the general estate. But if the liability is one which is incident to the subject-matter of the gift itself, the legatee must take it with the liability. Thus, a specific legatee of stock must pay the calls thereon. This, however, is not the rule with regard to gifts of real or leasehold property in respect of such property, subject to mortgages or liens for unpaid purchase-money; for in the absence of contrary intention, the donee will take them *cum onere*. (See 17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34.)

IX. From what time Legacies carry Interest.

We will now turn to another point arising in connection with legacies, viz., the payment of interest on legacies. As to specific legacies, if the legacy yield interest, the legatee is entitled to interest thereon until payment from the time of the testator's death. Thus, a specific legatee of stock takes the dividends on the stock from the death of the testator. But with regard to general legacies, if no time is specified, they will carry interest at the rate of 4% per cent. from the expiration of a year from such death; this year being allowed to the executors to pay the debts, and put the estate in order for administration. If a time is named, the legacy will not, of course, carry interest before the appointed period. There are, however, some exceptions to the rule. Thus, when the testator is the father, or is *in loco parentis* to the legatee, the latter being an infant, interest is payable from the testator's death. So, too, the legacy will bear interest from that date, when the legatee, though a stranger, is an infant, and maintenance is given out of the legacy, or where the legacy is given in satisfaction of a debt. The interest is allowed, in the first two cases, in order that the infant may have a fund wherewith to support himself till he can take the legacy itself, and in the last case as the substitution for the interest which would have been payable on the debt. If the legacy be payable at a future day, whether it be vested or not, it will as a rule only carry interest from the time fixed for its payment. But there will be exceptions, again, to this rule when the legatee is an infant child of the testator, and the will provides no distinct fund for maintenance, and where the

legatees are strangers to the testator, if there is a general intention expressed that maintenance is to be provided for them out of their legacies. Also where a fund is directed to be at once set apart from the rest of the testator's estate. But where the testator has otherwise provided for the maintenance of his infant children, they cannot claim interest before the period appointed for the payment of the legacy. The doctrine which entitles children to interest by way of maintenance will not, of course, extend to adults, nor as a rule to infants whose parents are living, unless in this last case the testator by his acts has evinced an intention to put himself in the relationship of a parent to that infant as regards the providing for it. (See *Powys v. Mansfield*.)

The remarks above made are, however, subject to the provisions of the Conveyancing Act, 1881, s. 43, as to maintenance, which enacts, that where property is held by trustees for an infant for life, or greater interest, whether absolutely or contingently on his attaining twenty-one, or on the occurrence of any event before his attaining that age, the trustees may pay the parent or guardian or apply towards the infant's maintenance the income of the property, whether there is any other fund applicable to the same purpose or any person bound by law to provide for the infant's maintenance or not. This section has been already fully commented on in connection with settlements. (*Ante*, Part IV. p. 338.)

But where the special fund nominated by the testator for the maintenance of his infant child is insufficient, and the legacy is vested, the court would always allow maintenance, even though the surplus interest was directed to accumulate. Further, where the legatee is a stranger to the testator and no maintenance is given, and there is a limitation over to others, interest will be allowed for maintenance if those others consent. And, where there is no limitation over, but all or some of the class of legatees must absolutely take the fund, there, as all have an equal chance of taking, interest will be allowed for maintenance, if the father of the legatees is unable to support them.

Another case in which interest is payable on a legacy from the testator's death, is where the legacy is charged on land. But this is not the case if it is charged on the proceeds of the sale of land directed to be sold; here interest will run from the expiration of one year from the testator's death.

Annuities.—An annuity begins to run from the death of the testator, and the first payment is due one year after his death. But if it is directed to be paid monthly or quarterly, instalments will be payable at the end of the first month or quarter, and so on.

If the testator wishes that the legatee should receive his legacy free from legacy duty, you should take care to insert a declaration to this effect in the will, otherwise the legatee will have to pay such duty. If the gift be made "free from deduction," or "free from expense," or of a "clear" legacy or sum, or of a fund to produce a "clear annual sum," in these cases the duty will be payable out of the testator's estate.

X. Several Legacies to the same Person.

When a testator gives two legacies to the same person, a question may arise whether such legacies are cumulative or substitutional. The rules on this point are, first, that legacies of equal amount given by the *same* instrument are merely repetitions, unless there is an apparent intention to give both. Parol evidence will be admitted to show such intention, or it may be deduced from the wording of the will itself, as where there was a gift to trustees on trust to pay a legacy of 1,000*l.* to A., and upon "further" trust to pay A. 1,000*l.* But if the legacies are not equal, the legatee is entitled to both. If the legacies are given by two different instruments, *e. g.*, one by a will, and another by a codicil, to the same person, he will take both, whether the amounts of the legacies are equal or not, unless it appear that the gift by the latter instrument is meant to be substitutional. Thus, if the testator in the codicil were to recite that he has not time to alter his will, the legacies given by it would be substitutional. (*Russell v. Dickson.*) And gifts by different instruments, if they are of the same amount, and are expressed to be given from the same motive or for the same purpose, are substitutional, not cumulative. (*Benyon v. Benyon.*)

The case is otherwise if the gifts are not of the same amount, and where even they are equal in amount they will be cumulative if they be given to a person describing him, but only so far that the description is a mere description, and not a ground for giving the legacy. Thus, a legacy is given by will of 100*l.* to a "servant,"

and another legacy of the same amount to the same person, describing him again as "my servant," both will take effect. (See *Wilson v. O'Leary*.)

XI. Legacies when Vested and when Contingent.

There will be but few cases in which your client will not desire to make a gift or devise or bequest to take effect on the happening of some future event. In such a case, he may wish either to give the beneficiary a present interest in the subject-matter of the gift, but to postpone the enjoyment or possession of it to a future time, or he may wish to postpone the taking of any interest at all therein until the future time. In other words, he may wish to vest the gift at once with a postponement of the payment thereof, or he may wish to postpone the actual vesting of the gift itself. In order to give effect to his wishes it will be necessary for you to understand the rules which regulate the question whether a legacy payable at a future time is vested or contingent. Where there is an express direction as to the period of vesting, nothing will vest before the appointed time. Where there is no such express direction, the courts will favour the construction which will result in an early vesting. First, as to the rules relating to real estate. A devise to A. and his heirs, if or when he attains twenty-one, is contingent, and he takes no interest till he attains twenty-one. But there are exceptions to this rule, and such a devise will be vested under certain circumstances. Firstly, this will be the case when there is created an estate, prior to A.'s, to some third person either for A.'s benefit or for that of some other person, to endure during the minority. (*Boraston's Case*.) Secondly, in a devise to A. for life, and from and after his decease to B., if he shall have attained the age of twenty-one, B. gets a vested interest. (*Andrew v. Andrew*.) Thirdly, if there is a gift over on the death under twenty-one, this fact will show that the devisee is to take whatever the person claiming under the devise over is not entitled to, i. e., the immediate interest, and the devise will be vested; but under a devise of such property to those of a class who attain twenty-one, the devise is contingent, and even though preceded by a life estate; so that if none of the class have attained twenty-one at the death of

the tenant for life, the devise over, if any, will take effect. (See *Festing v. Allen*.) And, fourthly, if there is a gift to A. for life, if she shall so long remain unmarried, or for life until bankruptcy, followed by a gift over on marriage or bankruptcy, the remainder is vested. (*Luzford v. Clark*; and see *Underhill v. Roden*.)

In cases not of a devise of land but of money charged on land, the rule is that if the legacy is given at twenty-one, or payable at twenty-one, and the person does not attain twenty-one, the legacy is not raiseable. (*Parker v. Hodgson*.) But if the payment is postponed, not from circumstances personal to the legatee, but for the convenience of the estate, as where there is a preceding life estate, the legacy will vest before the time for payment arrives (see *Evans v. Scott*); and if the legatee dies during the continuance of the life estate, his representatives will nevertheless be entitled to the legacy.

As to legacies of personal estate not charged on land. If there is an express direction as to the period of vesting, the legatee will take no interest till then, unless the meaning of the word "vesting" may be considered to be equivalent to "payable." Thus, where there is a gift to A. to be vested in him or to be paid to him when he attains twenty-one, A. will take an immediate interest. And where there is a direction to pay legacies at the death of the tenant for life, a subsequent direction as to the vesting at twenty-one will not make the legacies contingent. (*Barnett v. Barnett*.)

If there is no direction as to the time of vesting the following seem to be the rules:—When there is a clear gift, with an additional direction that it is to be paid when the legatee attains a given age, the interest will be vested, the payment only being postponed. But if the gift is to A. when he shall attain a certain age, and there is nothing to show that the time of payment is not an essential condition to the vesting of the gift, the legacy will be contingent. (See *Hansom v. Graham*.) But even where a legacy would on the wording of it be contingent, it may be construed as vested, if such seems to have been the testator's intention. Thus, if a legacy is given to A. when he attains a certain age, and there is at the same time a gift of the interest to A. in the meantime, or a direction to apply such interest or any part thereof for his mainten-

ance, or if the legacy is directed to be immediately separated from the rest of the estate, the legacy will vest at once. (See *Hansom v. Graham*.) This rule will also apply to a gift to a class of persons, except where the legacy is charged on land, or where the gift is to a class and the attaining of twenty-one is a part of the description of the class, as where it is to "such of my children who attain twenty-one." But it would apply if the members of the class were designated *nominatim*. And a mere discretionary power to trustees to apply the whole or any part of the income for maintenance is not within the rule. (*Leake v. Robinson, Re Grimshaw*.) And where a fund is given to a class of persons at a given age, with a direction to trustees to apply the income thereof for the maintenance of the members of the class generally, not confining the direction to the shares of each particular member, this will not create a vested interest in a member of the class who dies under the given age. (*Re Parker*.)

When, however, the event on which the legacy is to be paid is one which may not happen, however long the legatee live, as where it is marriage, &c., the legacy will be contingent. Thus, a gift to A. to be paid on marriage is a gift upon a condition, and is contingent (*Atkins v. Hiscocks*; and see *Taylor v. Lambert*), unless interest is given in the meantime. (*Booth v. Booth*.)

The great complexity of the rules relating to the solution of the question, Is a legacy vested or contingent? prevents us from giving you any fuller exposition of them than we have attempted above, and for more information about them we refer you to the leading case of *Hansom v. Graham*, and the notes thereto in Tudor's Leading Cases.

XII. Legacies upon Condition.

The next point with regard to legacies which we will draw your attention to, as being deserving of your notice, is the giving of legacies upon conditions.

If the condition is a precedent one, *i. e.*, is a condition which is to exist or be performed before the property given is to vest, the court will favour the donee, and will hold the gift vested upon a substantial compliance therewith; but if it is a subsequent

condition, *i. e.*, one upon which an estate or interest given is to divest, the court will construe it strictly, because it tends to defeat a previous gift. If a condition precedent is impossible, impolitic or illegal, the result will be different, according as the property is realty or personalty. In the case of real property, the property will not vest in the donee unless the condition be performed (see *Caldwell v. Cresswell*); but, in the case of personalty, the gift will take effect, notwithstanding the condition, except in the case where a condition involves no physical impossibility (*Robinson v. Wheelwright*); or where the fulfilment of the condition was the sole motive of the gift; or where the impossibility was not known to the testator when he imposed the condition; or where the condition, being originally possible, has subsequently become impossible by the act of God. And in both cases, if the condition becomes impossible by the act of the testator, the gift will take effect. (*Guth v. Barton*.) If the condition is void, as being a *malum in se*, the whole gift is void; whereas if it is merely a *malum quia prohibitum*, the gift will be absolute.

A condition inconsistent with or repugnant to the estate or interest given is void; such would be the case with a condition annexed to an absolute devise or bequest that, if the donee died intestate, the property should go over to someone else. (See *Bradley v. Peiroto*.)

As to conditions subsequent, if the condition is impossible or illegal, the gift will remain to the donee, unless there is a gift over, and even then it will not be divested if the condition has become impossible. But if the condition is good, and is not performed, it will work a forfeiture, even where the legatee is unaware of the existence of the condition. (*Re Hodges*; *Astley v. Earl of Essex*.) This will be the case as to realty, whether there is a gift over or not, and also as to personalty, subject to this qualification, that there are some conditions (*e.g.*, conditions in partial restraint of marriage) which will be held *in terrorem* only, and void unless there be a gift over.

Conditions in Restraint of Marriage.—The conditions which testators are most in the habit of imposing are conditions in restraint of marriage; conditions restraining alienation, or restricting the full enjoyment of the property given; and conditions

involving forfeiture of a gift by a legatee if he should dispute the will.

As to conditions in restraint of marriage, you should consult the leading case of *Scott v. Tyler*. The following is a summary of the rules laid down in various cases :—

(A) *Where the Property given is Land or a Charge thereon.*

(a) A limitation till marriage, and then over, is good, and the gift goes over on marriage. (See *Jones v. Jones*.)

(b) A condition in general restraint of marriage, whether precedent or subsequent, is bad, as opposed to public policy, unless annexed to a gift to a widow or a widower. (See *Allen v. Jackson*.)

(c) Where land is given subject to a condition precedent of marriage, with the consent of some third person, the consent must be procured before the gift can vest, and whether there is a gift over on marriage without such consent or not. But if the consent is arbitrarily withheld by the third person, the condition will be satisfied by marriage without his consent.

(d) If a gift is subject to be divested by a condition subsequent on marriage without consent, a breach of the condition will divest the estate, unless the condition becomes impossible to be performed.

(B) *As to Personality.*

The above rules (a) and (b) as to real property apply also to personal property.

(c) A condition precedent, requiring marriage with consent, is satisfied by marriage without consent, except where (1) there is a distinct gift over; (2) the condition is directed against marriage under a certain reasonable age; (3) the legatee takes another legacy on the breach of the condition. (See *Re Brown*.)

(d) A condition subsequent directed against marriage without consent is considered *in terrorem*, and the donee will retain the gift though he marries without consent, except in cases just mentioned in sub-clause (c).

(C) *As to Realty and Personality.*

A condition imposing a partial restraint on marriage only is good, *e.g.*, a gift to A., on condition that he does not marry B., or

does not marry before a reasonable age, or a native of any particular country, or a domestic servant (*Jenner v. Turner*), or a person of a particular religion, as a Papist (*Duggan v. Kelley*), or a Christian. (*Hodgson v. Halford*.) But a condition which, though in partial, will probably result in total, restraint of marriage, will be void; as where the condition is that the legatee shall not marry a person who has not freehold property of the annual value of 8,000*l.* per annum. (*Kelly v. Monk*.)

Conditions in Restraint of Alienation.—A general condition to this effect is bad; but a limited one, *e. g.*, a condition not to sell except to certain persons, is good. (*Re Macleay*.) But a condition not to sell except to one person is bad. (*Attwater v. Attwater*.) And so is a condition by which the devisee in fee is compelled before selling or leasing the property to offer it to some person or persons named at a given sum or at a stated rent. (See *Re Rosher*; *Rosher v. Rosher*.) If the restriction is directed to the restraining the sale of property for a limited time, not offending the perpetuity rule, it is good if there is a gift over. (*Renaud v. Tourangeau*.) Conditions of this nature are frequently made use of where annuities are given by will. For the gift of an annuity vests the right to a sum equivalent to the capital necessary to produce it in the annuitant, and he has the right to call for it, and a mere statement that he is not to do so is of no effect. (*Stokes v. Cheek*.) And again, where an annuity is given to A. for his life, a gift over on his bankruptcy is equally of no effect. (*Hunt Foulston v. Furber*.) The only way to exclude the annuitant from any claim to the price of the annuity in lieu of the annuity itself is so to limit it that it will be determined on alienation or anticipation. Similarly, life interests in property cannot be given subject to conditions that they shall not be alienated (except in the case of a gift to a woman). If a testator wishes to confer an inalienable life interest on a donee, he must limit it to him with a proviso by way of conditional limitation for ceaser on his attempting to alienate it, in which case the interest will cease even though there be no gift over. Thus, the interest may be given until alienation or bankruptcy, or it may be limited to the donee for life, but conditioned to determine on his attempting to alien it, or on his bankruptcy. A testator may often wish that the interest given to

a donee may on his becoming bankrupt be applied for the benefit of the family. In framing a gift to carry out his intentions in this respect you will have to bear in mind that the strongest expression by a testator of his wish that the donee shall have the personal and exclusive enjoyment of the property will not prevent it devolving on his trustee in bankruptcy. (*Brandon v. Robinson.*) Nor can an estate in lands or the entire interest in personalty, as distinguished from the ownership of the income thereof, be made liable to divestment, even on alienation or bankruptcy, and no gift can be made to a person with a continuing interest therein after his bankruptcy. The only mode in which the testator's intention can be effected is to give the property to trustees with a discretionary power either to give or withhold it as they think proper. But more than this, you should take care that the discretion given is limited so that it may not be exercised in favour of the donee himself, for when a life interest is given over on bankruptcy for the maintenance of the bankrupt and his family, the trustee in bankruptcy will be entitled to one-half that income (*Rippon v. Norton*); and if the trustees have a discretion to appoint what amount shall be applied to the maintenance of the bankrupt and his family, an inquiry will be directed as to how much ought to be applied for each, and what would have been taken by the bankrupt will pass to his trustee. (*Kearsley v. Woodcock.*) And even where the trustees have the power to apply the income for the benefit of the bankrupt or his family, if they do appoint any to the bankrupt it goes to his trustee in bankruptcy. (*Holmes v. Penny.*)

In connection with these kinds of restriction, note that when property is given over on alienation by the donee this means only voluntary alienation, not hostile bankruptcy as a rule, but was held to include liquidation under the Bankruptcy Act, 1869, and, where there was a very strong intention of personal benefit to the legatee, it was held to include even bankruptcy. (*Cooper v. Wyatt.*) And when property is given over on bankruptcy, this will include a bankruptcy taking place after the date of the will and subsisting at the testator's death, and even one the proceedings in which commenced before the date of the will and subsisting at the testator's death. (*Trappes v. Meredith.*)

A condition not to dispute the will is valid, and will be effectual to divest the property from the donee; but in the case of personalty

it must be accompanied by a gift over on non-compliance with the condition. But the effect of such a condition will not be to make an invalid gift good; and a condition not to institute legal proceedings as to the estate and effects devised is too general, and is bad. (*Ridges v. Russell*.)

XIII. Legacies to Creditors and Debtors.

Another point which you must consider is the consequences which will follow the giving of a legacy to a creditor or a debtor of the testator. The gift of a legacy to a creditor, equal to or greater than the amount of the debt, will be deemed to be given in satisfaction of the debt, but, if it is less in amount, then it is not a satisfaction, even *pro tanto*. Nor, again, will there be satisfaction when the legacy consists of a residuary bequest, or of something absolutely different. Thus, the gift of an estate will not satisfy a pecuniary debt. And, even though the legacy be equal to, or greater in amount than, the debt, it will not operate to satisfy it where it is expressly payable at a more distant time, or on a contingency, or for a specified and different purpose, or if the mode of payment directed makes the legacy less beneficial than the debt. Further, the presumption that satisfaction is intended will be rebutted if there is a direction in the will that debts and legacies shall be paid. (*Chancey's case*.) For the general rules as to the satisfaction of debts by legacies, we must refer you to the leading case of *Ex parte Pye*, where you will also find the doctrine relating to the satisfaction of legacies by portions laid down.

A legacy to a debtor of the testator will not release him from the necessity of paying his debt, unless evidence is forthcoming to show that the testator intended it to have this effect. (See *Eden v. Smyth*.) Therefore, if the testator's wish is to release the debtor, he should expressly state that he forgives or releases it.

Legacies to Charities.—If the testator wishes to give a legacy to a charity, you must take great care that you do not do anything which may be at variance with the Mortmain Acts. (See *ante*, p. 11.) And when a general gift of money is made to a charity, you should supplement it with a direction that it is to be paid out

of that part of the estate only which may be by law bequeathed for charitable purposes, and preferably to any other payment thereout.

XIV. Provisions for the Benefit of the Testator's Family.

After devising or bequeathing specific and general legacies the will is next concerned with provisions for the benefit of the testator's family. These vary so greatly with the state of the testator's family and his wishes concerning them that it is quite impossible to give you any sketch of the various schemes which may be adopted. Your duty as a solicitor is not to control the testator's wishes, but merely to put them into clear and unmistakeable language, the meaning of which cannot be open to misconstruction, and to take care that he does not in his disposition of his property infringe any of the precepts of the law. In taking your instructions from him you must accurately ascertain the condition of his family and of his affairs generally, and his wishes with regard to the manner in which his property is to be divided among those he desires to benefit. In most cases a will is made soon after marriage when the testator has a wife and the children are young, and in this case the property will most often be given to trustees to be converted into money, with a power to them to postpone such conversion, and a direction given out of the proceeds to pay the testator's debts and funeral and testamentary expenses, and to invest the residue (with power to vary the investments), and to pay the income to the wife for her life, and after her death to stand possessed of the trust funds for such of the testator's issue as she shall appoint, and in default of such appointment for such of the issue as attain twenty-one, or being a daughter marry under twenty-one. Then follow the trusts in default of any child attaining a vested interest and pointing out the ultimate destination of the property.

Provisions for the Testator's Children.—A few cautions will be necessary in framing the provisions for the benefit of the testator's children. First, it must be remembered that advancements may have been or may be made to them by the testator during his lifetime, and care should be taken not to leave it doubtful whether or

not such advancements are to be deducted out of their shares in such cases. The court favours this kind of satisfaction, so that where there is a portion secured to a child of the testator payable at his death, a legacy to him will operate in complete satisfaction of it, if it be equal to or greater in amount; and if it be less in amount it will go in satisfaction, *pro tanto* (*Warren v. Warren*); and slight differences affecting the payment of the legacy and the portion will not operate to prevent the doctrine of satisfaction from applying. (*Hinchcliffe v. Hinchcliffe*.) And the bequest of a residue may be a satisfaction of a portion either *in toto* or *pro tanto*, according to its amount. (See *Thynne v. Glengall*.) But this doctrine of satisfaction is only applicable when the testator is the father of or stands *in loco parentis* to the legatee. (See *Pouys v. Mansfield*.) So that a gift by will of a residue will not be considered to satisfy a covenant to leave a widow a certain sum. (*Devese v. Pontett*.)

Again, a testator who has left a legacy to his child may, after the date of the will, advance a sum of money to him, as upon his marriage, &c. Here the advancement will be deemed in satisfaction of the legacy, either *in toto* or *pro tanto*, as the amount may be. (*Ex parte Pye*; *Pymm v. Lockyer*.) But this will not happen when the legacy is different in kind from the advancement, as where one consists of an annuity, and the other of a gross sum, and even when they are both of the same description of property, but the gifts are made with different purposes. (*Roome v. Roome*.) But a bequest of a residue will be adeemed by a subsequent advance of a portion either wholly or in part, just as it would be in the case of a legacy of a fixed amount. (See *Stephenson v. Masson*.) For further information on the subject of the satisfaction of portions by legacies, and of legacies by portions, we refer you to the leading case of *Ex parte Pye*.

Testators usually treat their children as a class. We have already mentioned the rules which are applicable for the determining at what period the members of a class are to be ascertained (*ante*, p. 437), and we have also discussed the question, At what period do contingent gifts become vested? (*Ante*, p. 457.) And, as we have seen, the trustees have power, under the Conveyancing Act, 1881, to apply the income of the shares of children towards their maintenance. (*Ante*, p. 338.) But, in the absence of express

provision, the trustees have no power to apply any part of the trust fund itself towards the advancement in the world of the children, without the sanction of the court, so that if it be so intended an express power to this effect must be given to them. Such a power generally authorizes the trustees to apply, in or towards the advancement in the world of the children, any part not exceeding one-half of the principal of their respective shares, and for that purpose to raise, by mortgage or otherwise, such sum as they may think fit.

Provision should be made to meet the case of the children dying during the life of the testator (or the life of the widow, if the vesting of the shares is postponed till after her death) and leaving issue. In the latter case there will be of course a lapse, but in the former the 33rd section of the Wills Act will, in some cases, prevent a lapse. But this section does not apply to a gift to a class; so that where there was a bequest to the testator's children living at his decease, and one child died during his lifetime leaving issue, it was held that his representatives took nothing, but that the other children alone were entitled. (*Fulford v. Fulford*.) Again, in *Stewart v. Jones*, where there was a gift to the testator's children, now born or hereafter to be born, and, as to the share to which each daughter should become entitled, upon trust for her separate use for her life, and after her death for her children, and one of the daughters died in the testator's lifetime leaving children, it was held that they were not entitled. Care, then, should be taken to prevent cases of this sort occurring, by the insertion of a clause that, if any of the testator's children who attain twenty-one, or marry under that age, should die in the testator's lifetime leaving a child who may survive the testator, then the fund which the parent would have taken, had he lived to acquire a vested interest, shall be held by the trustees for such children. Again, you must note that the 33rd section of the Wills Act does not apply to special powers of appointment, though it does apply to general powers of appointment. Thus, if the testator has a power to appoint a sum to each of his children by will, and he exercises this power, and one of his children dies in his lifetime leaving issue, the gift to him will nevertheless lapse, for the Wills Act uses the words "devise and bequeath," and

not the word "appoint." (*Holyland v. Lewin.*) Against this, then, you must also provide by a clause giving the issue of such children who die in the testator's lifetime the share their father would have taken under the appointment had he survived the testator.

Gifts over on Death.—When a will contains words providing against the death of devisees or legatees, a question often arises whether they refer to the death of the devisee or legatee in the lifetime of the testator, or to death at any, and what, subsequent period. The rules on this point are laid down in the case of *Edwards v. Edwards*, and are as follows:—(1) Where there is a gift to A., and if he shall die to B., the contingency on which B. is to take is the death of A. in the lifetime of the testator. (2) Where there is a gift to A., and if he shall die without children to B., the contingency has reference to the death of A. (3) Where there is a gift to Z. for life, with remainder to A., and if he shall die to B., the contingency has reference to Z., the tenant for life. (4) Where there is a gift to Z. for life, with remainder to A., and if he shall die without children to B., the contingency has reference to A.'s death at any time. (See *Mahony v. Burdett.*)

But sometimes words referring to death will not be construed as referring to death in the testator's lifetime, and will apply exclusively to death after his decease. Thus, when a testator bequeaths property to A. for life, and after his decease to his children, and provides that if any of the legatees die before their legacies become payable, then the legacy of each so dying shall go to his executors and administrators, these words will mean dying in the interval between the death of the testator and the death of A., and will not be considered as disposing of the legacies failing by lapse. (See *Corbyn v. French.*)

Provisions as to Lapse.—Provisions intended to prevent lapse when there is a gift to a class also require great care in their treatment. Thus, where a testator bequeathed a sum of money owing to him by A. to the younger children of A., to remain in A.'s hands till the children were capable of receiving it, the legacy or share of any of them dying before such time to go to the

survivor or survivors of them, it was held that this must be construed "if the legatee should have survived the testator," but that where the legatee died in the lifetime of the testator as nothing could vest in the legatee, so neither could it survive from him. (*Rider v. Wager.*) There are many conflicting cases on this subject; the rule seems to be that where there is a gift to children living at the testator's death, with a direction that if any should die in his lifetime, his issue should be substituted for him, and take his legacy, all the children living at the date of the will must be taken into account, whether they die in the testator's lifetime or not; and the issue only of parents who were alive at the date of the will will take. (*Christopherson v. Naylor.*) But if there is a gift to children living at a definite time, and a distinct gift to issue of children dying before that time, with a proviso that the issue shall only take the parent's share, then, though no children dead at the date of the will would take a share, the issue of such children would, there being a distinct gift to them. It is important to bear in mind the distinction between a mere substitution of issue for the parent, and a distinct gift to the issue in event of the parent dying. A substitutional gift must be distinguished from an absolute gift to the donee for life, with remainder to his children, for in the former case, the substitutional gift will take effect though the original donee dies before the testator. Whereas, in the latter case, if the donee dies in the lifetime of the testator, the whole gift will fail. Thus, where there is a gift to a class of parents with a substitutional gift to the children of parents dying before the period of distribution, the children of parents who die after the date of the will, and before the testator, will take. (See *Re Hotchkin.*) Again, where gifts to children make provision for letting in the issue of children dying before a specified period, questions have arisen whether the issue will take, if they do not outlive the prescribed period of distribution. It has been held that they will take, though they do not outlive such period. The contingency attaching to the gift to the parents does not attach to that to their issue, and they accordingly take vested interests; e. g. if there is a bequest to A. for life, then "to such of my nephews as may then be living and the children of such as may then be dead," the children take vested interests on their parents' deaths, whether they survive A. or not (*Martin v. Holgate*), and

whether they take by original gift to them or by substitution for their parents. (*Re Merrick*.) But under a mere substitution of issue for a parent, the children only of those who survive the parent will take. (*Hunfrey v. Hunfrey*.)

In limiting gifts over in case a legatee dies before his legacy is payable, the following rules should be attended to by you:—

(1) Such a gift over will take effect if the legatee dies in the testator's lifetime, though after the period fixed for payment (*Re Gaitskell*), or if he dies after the testator but before such period. (*Rammel v. Gillon*.) If no time is fixed for the payment, the period of payment will be referred to the date of the testator's death.

(2) If there is a gift to A. for life, and after his death to B. and C., and a gift over in event of the death of either before their respective legacies become payable, the gift over will take effect as to the share of either of the two who dies before A. (*Croilder v. Stone*.)

(3) If there is a gift to A. for life, followed by a gift to his children at twenty-one, with a gift over on death before the legacy is payable, the gift over will take effect, as regards the shares of legatees who die in the testator's lifetime, even though over twenty-one (*Walker v. Main*); and if the gift is to A. for life, and then the property is vested in his children to be divided at twenty-one, with a gift over if any die before their shares are payable, here "payable" will mean "attaining twenty-one," and the issue of children will take who die in the lifetime of A., but over twenty-one. (*Halifax v. Wilson*.)

But where there is a gift to A. for life, and then to her children, to be transferred to them at twenty-one, and if any die before their shares are payable, leaving issue, to such issue, and if any die before their shares are payable without issue, then over, here the gift over will be good on the death of a legatee during the life of the tenant for life, though they may have attained twenty-one, for the word payable in its ordinary sense would mean payable at the death of A., and there is no reason for altering the ordinary meaning, since the issue of those dying before their shares are payable are provided for under the terms of the gift. (*Re Willmott*.)

In providing for the issue of unborn persons, you must have the perpetuity rule before your mind. We have already referred to this rule. (*Ante*, pp. 333, 335.) We will here merely draw your attention to one or two points which have been decided under it. A gift, the result of which is to postpone the vesting of property for more than twenty-one years after the testator's death, is void, though he does not avail himself of the permitted period of a life or lives in being as well. If the vesting of a grandchild's share is postponed to the death of the survivor of its parents, the gift will be too remote, for a child of the testator may marry a person born after the testator's death, and that parent may be the survivor. (*Hodgson v. Ball*.) Where one part of an entire gift does not, but the other does, infringe the rule, the whole gift fails. Thus it will be in case of a gift to the children of A. and the grandchildren of B. a living person. (*Leake v. Robinson*.) But if the testator expressly cuts the gift into two parts, and gives one to the children of A., and the other to the grandchildren of B., the whole gift will not then fail, but only the gift to the grandchildren of B. (*Re Moseley*.)

In carrying out instructions to direct the accumulation of income you must take care that you confine such accumulations to one of the periods allowed by the Thellusson Act. But it is not so serious a matter to go beyond the provisions of this statute as it is to infringe the perpetuity rule; for a direction to accumulate income which exceeds the authorized period is not altogether void, but only void as to the excess. (See *Griffiths v. Vere*.) But an accumulation which prior to the Thellusson Act exceeded the limit allowed by the perpetuity rule, was held not to be set up by that act so as to be valid for the period of twenty-one years. (See *Boughton v. James*.) Accumulation can only be directed for one of the periods named in the act (*Wilson v. Wilson*), and the act applies where there is no direction to accumulate, but where there is in the will an executory gift or devise of such a nature that accumulation becomes necessary during the suspense of vesting. (See *Macdonald v. Brice*.)

XV. Duties of Executor with regard to Wasting Property.

When personal estate or the residue of personal estate is given to any person for life with a remainder over, it will be the duty of

the executors to convert into money any part thereof which consists of property of a wasting or perishable nature. (See *Howe v. Dartmouth*.) But it may appear that the intention of the testator was, that the tenant for life should enjoy the property *in specie*, and in such case there will not arise the necessity of converting. Such an intention will be argued if, for instance, there is a direction (when the property consists of leaseholds) to renew them, and keep houses thereon in repair; or a trust to sell the property on the death of the tenant for life, or on a given event, or not to sell without the direction of all parties, or to retain any portion of the estate in the same state in which it shall be at the testator's decease. (*Grey v. Siggers*.) And there is no necessity to convert the property when it is given *specifically*.

Again, a similar duty to convert will fall on the executors when there is a gift of the residue of the estate to several persons in succession. The burden of proof is in every case upon the person who says the rule in *Howe v. Dartmouth* should not be applied. (*Macdonald v. Irvine*.) The insertion of a mere power or discretionary trust, does not amount to an indication that the tenant for life is to enjoy *in specie*. (See *Porter v. Baddley*; *Grey v. Siggers*.) By neglecting to convert, the trustee will incur a liability for any loss which may occur. Thus, if by the terms of the will the trustees were authorized to invest in real as well as government securities, they will be liable for the amount which would have been produced by a conversion at the end of a year from the testator's death, with interest thereon at 4 per cent.

If they were bound to invest in the 3 per cents. only, they will be liable for the amount which would have been produced by a conversion and investment at the end of that first year, with interest at 3 per cent. from that time. But should any gain arise the beneficiaries will be entitled to it, and as between the tenant for life and the remainderman, the former will receive such interest as he would have received if the conversion and investment had been made at the end of the first year, and the excess of the income will be added to the corpus and with such corpus go to the remaindermen.

When residuary property is directed to be sold, and the produce laid out in government or real securities for the benefit of A. for life, and after his death to others, and no direction is given as to the accumulation of the profits accruing before conversion, the

income which arises from such part of the residue as, at the time of the testator's death, was invested in securities of the same nature as those which are directed to be invested in, will go to A. from the time of the testator's decease. (*Hewitt v. Morris.*) But as to such part thereof as is not then invested upon securities of the same nature as those directed, the income thereof during the first year from the testator's death will not go to A., but he will only be entitled to so much income as the property would have produced if invested according to the will, and the excess income will be added to the corpus of the residue. (*Holgate v. Jennings ; Dimes v. Scott.*) The tenant for life of a residue is not entitled to the income of such part of the testator's estate as is applied in payment of legacies, during the period which intervenes between the testator's death and the time when such legacies are actually paid ; such income forms part of the corpus of the residue. (*Holgate v. Jennings.*) To prevent any questions arising as to the destination of the income prior to the conversion, you should, in every case, authorize the executors to postpone the sale and conversion as may seem fit to them, and direct that the rents and profits should, from the time of the testator's death, go to the same person and in the same manner as the income of the proceeds of the conversion would be applicable if the conversion had been made.

In connection with the direction to sell and convert, you should not include copyholds in such a direction, for this would involve the admittance of the trustees whenever they wished to sell, and the consequent liability to pay fines and fees due thereon. It is the practice to give them a mere power to appoint the copyholds, and when an appointment is made by them to a purchaser, he is considered as coming in under the will, and the necessity of the trustees being admitted is obviated. (*Holder v. Preston.*) But this plan can only be adopted when it is intended to sell at an early date, for the lord of the manor can, if this is not done, seize the land *quousque*, and compel the legal admittance of the person entitled to the legal ownership.

The testator's family having been provided for, provision may be made to meet the event of there not being any issue to take. Sometimes the property is given to the testator's brothers and sisters and the children living at the testator's death, or such of them as have died during his lifetime, equally *per stirpes*.

XVI. Appointment of Guardians.

The testator may also wish to appoint a guardian to his infant children. This he can do by virtue of 12 Car. 2, c. 24. But the power given by this act does not extend so as to enable the *mother* to appoint a guardian. This guardian can be authorized to appoint a new guardian to act when he dies. (*Re Parnell*.) But the act does not enable a testator to appoint a guardian to any but legitimate children, nor to children married at their father's death. If two persons are appointed guardians, the guardianship survives. (*Eyre v. Shaftesbury*.)

XVII. Trustees' Powers and Clauses.

With regard to the powers to be given to the trustees, the observations which we have already made as to the power of the trustees of marriage settlements will apply equally to trustees under wills. As we have also previously remarked, a devise of estates vested in the testator as a trustee or mortgagee will now be unnecessary, and in fact inoperative, as by sect. 30 of the Conveyancing Act, 1881, such estates become vested on his death in his personal representative, notwithstanding any testamentary disposition thereof. This section has been held to apply to copyholds. (*Re Hughes*.) It may be well, however, in this place to again call your attention to a plan which has been suggested by high authority (see Wolstenholme & Turner's Conveyancing Acts), by which this section may be practically evaded, and devises of trust and mortgage estates made. This plan is for the testator to make A. his special executor of his trust and mortgage estates, while B. is made his general executor. For our part, however, with great deference, we do not think that the court would allow such a plan to be effectual, since it would really enable a devise of trust and mortgage estates, which, by the words of the section referred to, are to vest in the personal representative *notwithstanding any devise*.

In conclusion, note that any interest undisposed of by the will, will, if realty, pass to the heir, and, if personalty, to the next of kin; and a direction that a certain person is to take no share in the estate of the testator, or disinheriting the heir, will not prevent him from taking as next of kin or heir. If realty is devised to a

trustee on trusts which fail, and there is no heir, the trustee formerly took beneficially, but now the equitable interest would escheat under the Intestates Act, 1884; but in the case of chattels real or other personalty, the crown, and not the trustee, has always been and is still entitled, if there be no next of kin. Unless the will shows a contrary intention, the executor, as distinguished from a trustee, will, under 1 Will. 4, c. 40, hold the undisposed-of residue for the benefit of the next of kin, but if there are no next of kin he will be entitled to it in his own right. (*Roose v. Chalk.*) But he will only take such part of the residue as the testator did not attempt to dispose of, so that he will not be entitled to legacies which have lapsed, nor will he take beneficially if expressly appointed to carry out the trusts of the will, and be treated as undertaking a duty and not receiving a benefit, or if the testator shows an intention to dispose of the residue though he has not actually done so. (See *Mence v. Mence.*)

PART VI—SOME MISCELLANEOUS SUBJECTS.

CHAPTER I.

PARTNERSHIP DEEDS.

I. What Constitutes a Partnership.

A PARTNERSHIP is a combination of persons for the purpose of carrying on as principals a common undertaking for the common profit. No writing is necessary to constitute the relationship of partners, unless the objects for which the persons have associated are of such a nature that they cannot be effected within a year, when the contract must be in writing under the fourth section of the Statute of Frauds. And a firm may not consist of more than ten members, when the business is a banking one, or of more than twenty in the case of any other business, unless it is registered under the Companies Act, 1862, or is formed under the provisions of some other act of parliament, or by virtue of letters patent, or charter from the crown, or is a mining company subject to the jurisdiction of the stannaries. The mutual participation of profit and loss will make the parties partners as among themselves; but the mere sharing of the profits of a concern will be *evidence* of partnership, strong, but not conclusive (*Car v. Hickman*), so as to make them partners so far as their liability to third persons is concerned. This, however, must be taken subject to the provisions of 28 & 29 Vict. c. 86, which, *inter alia*, enacts that the advancement of money by way of loan to a person in trade, or about to engage therein, on a *written contract* that the lender shall receive a rate of interest varying with the profits or a share of the

profits, shall not of itself make the lender a partner; that no contract for the remuneration of a servant or agent of a person engaged in trade by a share in the profits thereof, shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner; that no person receiving by way of annuity or otherwise a portion of the profits of a business, in consideration of the sale by him of the goodwill of such business, is by reason only of such receipt to be deemed a partner, or be subject to the liabilities of the person carrying on such business. But if such person becomes bankrupt the lender of any such loan will not get any portion of his principal, or of the profits or interest payable thereon, nor will the vendor of the goodwill be entitled to recover any of such profits, till the claims of all the other creditors for value have been satisfied.

In cases falling within this statute, the sharing by A. of the profits of a business carried on by B. is no evidence at all of partnership; but in other cases, if A. shares the profits of B.'s business, such sharing will be *prima facie* evidence that A. has made B. his agent to carry on the business for him, and if the court considers that the evidence of agency is sufficiently strong, A. becomes liable as partner. (See *Cox v. Hickman* and *Walker v. Hirsh*.)

Further, note that on the same principle a person may make himself liable as a partner of a firm if he lends his name and credit to it, and holds himself out to the world as a partner, and this though he may not have any interest in the business at all. (See *Waugh v. Carver*.) And a person who does not appear to the world as a partner, but is a "dormant" or "sleeping" partner, will be liable, although he may not have been known to have been a partner by the person who seeks to make him liable at the time the obligation by the firm was contracted. (*Whittle v. Crouther*.)

II. The object of Partnership Articles.

A partnership may be looked at from two points of view: the liabilities of it to the outside world, and the rights and liabilities of the members thereof among themselves. It is with the object of defining these latter rights and liabilities that partnership agreements are entered into. The liabilities of the members of a firm

to outside parties cannot be altered by any agreement between those members themselves, and any agreement they may enter into controlling them will not bind a third person unless it is brought to his knowledge.

As regards the outside world, the law is that one partner is the accredited agent of his co-partners, and has full authority to bind them as well as himself by any contract he may enter into, so long as it is within the ordinary course of the firm's business, and the person with whom he deals acts *bonâ fide* and in ignorance of any clause in the partnership articles restricting the partner from dealing with him. But the contract to bind the co-partners must be strictly within the scope of the business carried on by the firm. Thus, one partner cannot bind the others by issuing bills or notes in the firm's name, unless bill transactions form part of the ordinary business for which the partnership was constituted; so that while a partner in an ordinary mercantile firm can bind the firm by bill, one member of a firm of solicitors or of farmers could not do so, the issuing of bills not being within the ordinary scope of the latter businesses. And, again, the other partners will be liable for the fraud of one of their co-partners if it is committed in any matter relating to the business they jointly carry on. (See *Willett v. Chambers* and *Cleather v. Twisden*.) For further information on this subject you should refer to the leading case of *Waugh v. Carter*. It does not come within the scope of our remarks, for, as we said before, the liabilities of the partners, *quoad* third parties, cannot be altered or affected in any way by the partnership articles.

The object, then, of partnership agreements is generally to define the rights and liabilities of the partners among themselves. In drafting them you will require not only legal knowledge but also considerable administrative skill, for they are intended to deal not merely with the legal position of the partners to one another, but also to serve "as a code of directions to them, to which they may refer as a guide in all their transactions, and upon which they may settle among themselves differences which may arise without recourse to the court." (Lindley on Partnership.)

III. Who may be Partners.

As to the parties to the agreement, an infant may be a partner, but the contract will not be binding on him, and he may avoid it on his coming of age, if he takes steps to do so within a reasonable time thereafter; but he is a very undesirable person for a partner, as his acts, though they bind the firm, will not bind himself personally. A married woman is now quite competent to be a partner, though it does not seem very clear how far she has the right to neglect her domestic duties, and her duties towards her husband, for the counter or desk.

IV. Usual Provisions of Partnership Articles.

The articles are concerned, in the first place, with stating the nature of the business, the duration of the term for which the partnership is to subsist, the style or name under which it is to be carried on, and the premises where the business is to be transacted. Then come provisions dealing with the manner in which the capital to be employed is to be provided, defining the shares to be brought in by each partner, and regulating the manner in which the profits are to be shared, and the losses and expenses borne, empowering the partners to draw sums of money for present needs from time to time, stipulating for the keeping of books of account, and generally defining what powers each individual member of the firm shall have, and what duties shall be incumbent upon him in the management of the business. Provisions are then made for the taking of annual accounts. Then follow clauses indicating what is to be the effect of the death of a partner, or the dissolution of the firm from any other cause, and what are to be the rights of the partners among themselves on the occurrence of such an event, provisions for continuance of the business by the remaining partners, and for the adjustment of accounts with the representatives of the deceased, or with the retiring partner, and the articles generally conclude with a clause providing for the settlement of difficulties and differences between the partners by reference to arbitration. We must now examine the provisions somewhat more in detail.

Nature and Scope of Business.—You should be careful to state clearly what is to be the nature and the scope of the proposed business; for you must remember that the power of one partner to bind his co-partners extends to all the engagements he enters into within the ordinary scope of the business; so that if this is left doubtful, vague and unlimited powers will be placed in the hands of one member of the firm. If no time for the commencement of the partnership is named, it will be deemed to have commenced as from the date of the articles.

Length of Term.—A time should also be fixed for the termination of the partnership. It is not advisable to have a very long term, because it may happen that circumstances may arise which, while they do not in law afford a ground for dissolution, nevertheless make it desirable that the parties should discontinue to carry on business in co-partnership; and again, it is not desirable to have too short a time, as it will not allow sufficient time for the partners to settle down to work in harmony. The term of ten years is generally adopted in practice, though of course the length of the term is a matter in which the parties must suit themselves, and which will depend to a large extent on the nature of the proposed business. The effect of fixing a definite term during which the partnership is to last is, that it prevents any one partner exercising the right, which he would otherwise have, of determining the term at will. (*Peacock v. Peacock.*) But even when a term is fixed there are certain circumstances which will have the legal effect of dissolving the partnership. Of these we shall treat in a subsequent portion of this chapter.

Provisions as to one Partner Retiring.—Sometimes a right to retire is given to each partner. In this case it will be the function of the articles to declare upon what terms he shall exercise that right. It is sometimes stipulated that he shall not have the right to retire before a certain time, and that he shall give a specified length of notice before doing so, and that the other partners shall in such case have the right to purchase his share under certain limitations. Provision will also be made for the fixing of the value of the retiring partner's share, and it may be stipulated that it is to be valued with reference to the last annual stock-taking, or that it

shall be ascertained by a valuation, and it should declare whether or not the value of the goodwill is to be taken into account in determining how much the retiring partner is entitled to. And where it is thought desirable, clauses should be inserted prohibiting the retiring partner from carrying on a business similar to that carried on by the firm within a certain radius, and that if he starts business outside that radius he will not solicit custom from the firm's customers. (*Pearson v. Pearson.*) It may be arranged that the retiring partner's capital shall be paid out to him in a lump sum or by instalments, or that it shall remain as a loan to the firm for a certain term, and in the two last cases it should be shown what security is to be given to the owner for the payment of his capital.

Determination of the Partnership by Notice.—Sometimes, too, a power may be given to any member of the partnership to determine it by a notice, if it appears, upon any taking of accounts, that after the payment to each partner of interest on the amount of his capital invested in the business, the concern has been carried on at a loss. Again, it may be provided that if any partner commits a wilful breach of any of the stipulations of the articles, the other partners shall have power to expel him from the firm. But provisions of this nature should be guarded by clauses that the expulsion should only take place after notice given, and that such notice should be given within a limited time after the committals of the breach, and it should be provided that if a question should arise as to whether any occasion has arisen justifying the exercise of the power to expel, such question should be settled by arbitration. It is doubtful if it is expedient to expel a partner under such a clause without giving the offending member an opportunity of explaining his conduct (see *Stewart v. Gladstone*), unless it is so framed as to enable an expulsion to be made without assigning any reasons at all therefor. (See *Russel v. Russel*.)

Provisions as to Death or Bankruptcy, &c.—Even though it is stipulated that the partnership shall continue for a certain term, the death or bankruptcy of any member will put an end to it. So, also, will the taking of the share of a member in execution

under a *fi. fa.*, or the occurrence of some event which renders the partnership illegal.

Dissolution of a Partnership in Equity.—There are certain occurrences which, though they do not of themselves operate to dissolve the partnership, will yet afford a ground to the Chancery Division for decreeing a dissolution before the legal termination of the term. The court will decree such dissolution where the partnership has originated in fraud, where there are continual breaches of the articles, or where there is gross misconduct of any of the partners in a partnership matter, where there is permanent and wilful neglect of business, where there is a disagreement among the partners of so serious a nature that it is impossible to carry on the business profitably, or where a partner, whose skill is indispensable, becomes permanently insane. Formerly, the marriage of a *feme sole* partner operated, *per se*, to put an end to a partnership; but this would appear to be no longer so, owing to the provisions of the Married Women's Property Act, 1882. Such a marriage would, however, apparently be a ground for a dissolution by a decree of the Chancery Division. If it is wished that any portion of the partners should have the power to continue carrying on the same business after the taking place of some event, which has the effect of dissolving it, provision should be made to that effect; and it must be stated what is to be done with the share of the person or persons who cease to be partners. It is generally stipulated that the share shall be sold to the remaining partners, who shall thereupon take upon themselves all the partnership debts and liabilities, and have liberty to carry on the business. The value of the shares of the outgoing partners may be directed to be ascertained by reference to the last annual stock-taking or by a valuation.

Special Provisions necessary when an old Business is taken over.—Partnership articles may be required either on the occasion of two or more persons entering into a partnership to carry on a new or original business, or of the taking over of an old or established business by new persons, or by a new person or persons, in conjunction with the old partners or some of them. In the former case there will, of course, be no existing debts; but in the latter

there may, and probably will, be debts and liabilities outstanding on the part of the old firm. The law as to the position of the incoming partners, with reference to the liabilities of the old firm, is that they are not answerable for any of the debts of the old firm contracted before the period of their admission, and no agreement with regard to such debts entered into by them with the old firm will give the creditors the right to look to them for payment, nor will any undertaking have such effect unless it be one made with the creditors themselves. The arrangements made between the old and the new firm may be that the stock in trade, and generally all the assets of the old firm, shall be transferred to the new firm subject to the liabilities. The latter will be estimated and their amount deducted from the estimated value of the assets, and the amount so arrived at will be treated in the partnership articles as the capital brought in by the members of the old firm. Another plan sometimes adopted is to wind up the old firm altogether, and the old partners will contribute their capital to the new firm just as if they were persons entering into an original partnership. As it may be some time before the affairs of the old firm can be wound up, and the amounts due to the members thereof ascertained, they may, instead of paying their capital down at once, covenant in the articles to bring in specified amounts on fixed dates so as to allow time for the realization. The articles generally state what the capital is to consist of, and provide that it shall be employed in the business. It is also provided, in cases where the partners do not contribute the capital in equal shares, and it is not intended that they shall share the profits equally, that each partner shall receive interest at a fixed rate on the share of capital brought in by him, and that any advances made to the firm by him, with the consent of the firm, beyond the amount agreed to be brought in by him, shall be considered to be a debt due from the firm to him, and shall bear interest. In the absence of provision to the contrary, partners will not be entitled to interest on capital, unless it has been the usual course of dealing among them to allow interest. (*Cooke v. Benbow.*)

Provision as to sharing of Profits.—In the absence of stipulation, the partners are entitled to share profits equally, though their shares in the capital may be unequal (*Peacock v. Peacock*); so that

where it is intended that they shall take shares therein proportionate to the amount of their respective shares in the capital, this should be expressly provided for.

Provisions as to Expenses.—Provisions are then made for the bearing of expenses and of losses incurred in carrying on the business, and it is generally provided that they shall be borne in the first instance by the earnings of the business, and if these are insufficient, then by the partners rateably in proportion to their respective shares in the profits. To provide for the immediate and personal expenses of the partners, each member is generally allowed to draw out of the partnership cash on account of his share of profits for the current year, and the amount which each shall be at liberty to draw is specified. It is provided also, that if the sums drawn out from time to time by any partner in any one year exceed his share of the profits for that year, the excess shall be refunded by him.

Provisions are then made that proper books of account shall be kept, and all transactions entered therein.

Status and Powers of each Partner.—Then follow clauses determining the personal status of each partner and regulating his powers. In the absence of any such provision, each partner has the right to take part in the management of the business. (See *Rowe v. Wood.*) Sometimes all the partners are required to devote their time and attention to the business; sometimes one or more of them is exempted from attending to it, or is required to devote his labours to one or more particular branch or branches of it, and the members generally are often precluded from carrying on any other business. Each partner is required to be faithful to his fellows in all transactions, and to furnish correct accounts and statements of all such transactions, not to employ the effects of the firm, except in the business, nor to do anything whereby the same or his interest in the same may be taken in execution for private debts, nor to become bail for any person, nor to discharge any servant of the firm without the consent of the partners, except for flagrant misconduct; not to lend money nor deliver on credit any goods of the firm to any person whom the other partners shall by notice in writing have forbidden him to trust, nor to release or compound

any debt owing to the firm, except with the consent in writing of the other partners.

The taking of Accounts.—Then come the stipulations as to the taking of yearly accounts. These generally provide that an account shall be taken on the 31st of December of every year, for the year ending upon that date, of the stock in trade, credits, property and effects, debts and liabilities of the firm, that the account shall be entered in as many books as there are partners, and that each book shall be signed by each partner, and retained by him, and that he shall be then bound by that account. But provision is made for the reopening of the account if any manifest error is found therein within a limited time after the signature. In spite of such a provision, however, a partner will not be bound by an account which he has been induced to sign by fraud or misrepresentation, and he can always have it reopened on these grounds by application to the Chancery Division.

On the termination of the partnership term by the effluxion of time, it is usual to provide that the assets shall be realized, and the proceeds applied first in the discharge of the liabilities of the firm, and then in payment to each partner of the capital brought in by him with interest, and then the surplus is to be divided among the partners rateably in proportion to their shares in the profits.

Provision as to Death of one Partner.—The provisions to meet the event of the death of a partner (which operates at law to dissolve the partnership), are generally very similar to those made to meet the case of the retirement of a partner. (See *ante*, p. 480.) Provisions are made for the taking over of his share by the survivors, and for the payment out to his representatives of his capital in a lump sum, or by instalments, or that it shall remain as a loan to the firm for a fixed time, and also as to the manner in which the value of the share in the profits is to be ascertained. (See *ante*, p. 481.) Note that in the absence of any stipulation, upon a dissolution, each partner has the right to require that the whole partnership assets shall be realised by sale; but this right will not be allowed to be exercised if it would unduly injure the other parties interested; and that the right to wind up the affairs of the firm is personal to the members, and cannot be exercised by the executors

of a deceased partner, or the trustee in bankruptcy of a bankrupt partner.

Power for Majority of Partners to act.—Further, it is frequently provided that all questions as to the conduct and management of affairs, including the employment and dismissal of servants, and the giving of credit, and the compounding of debts shall be determined by a majority of the partners.

Arbitration Clause.—The articles generally conclude with a clause providing that all differences arising among the partners, as to the construction of the articles or as to any division, act, or thing to be made or done in pursuance of its terms, or as to any other matter relating to the partnership, shall be referred to arbitrators, one to be appointed by each of the parties in difference, or to an umpire chosen by the arbitrators before entering on the consideration of the matters referred to them; and that every such reference shall be deemed an arbitration within the Common Law Procedure Act, 1854, and be subject to the provisions to arbitration therein contained. It should be provided that the articles themselves should be deemed a submission to the award, and that the submission may be made a rule of court. The effect of so providing will be that the reference will not then be revocable, as it otherwise would be at the pleasure of any of the partners. The arbitration clause will be enforced in a proper case (*Pleus v. Baker*), even though the partnership term has expired. (*Gillett v. Thornton*.) Legal proceedings may be commenced notwithstanding the clause, but the court may, under the Common Law Procedure Act, 1854, if no sufficient reason exists why the matters in dispute should not be referred to arbitration, stay proceedings. The court in doing so will exercise its discretion. (*Julius v. Bishop of Oxford*.)

CHAPTER II.

DEEDS OF DISCLAIMER.

A DEED which you may sometimes be called upon to prepare is a deed of disclaimer. These are thought of generally only in connection with trustees and executors; but they apply in many other cases as well. For the law enables a man to whom a gift of property of any kind is made to exercise the option of taking it or declining it. No one in his senses will, of course, think of declining a gift of property which is beneficial to him, but it may happen that the donee of a gift may not think it beneficial, and in such case he has the power of renouncing or refusing the gift. But he may only exercise this power before he has accepted the gift. Having once accepted it, and shown his acceptance of it by dealing with it in any way, he is no longer at liberty to renounce it. The only course which is then open to him is to get rid of it by some recognized and legal form of conveyance. (See *Hurst v. Hurst*.) It would seem that copyholds, leaseholds and personal property may be disclaimed by parol. It is doubtful if freeholds can be so disclaimed. (See *Re Gordon* and *Re Ellison's Trusts*.) It is the better course to execute a disclaimer by deed. And a disclaimer by a married woman of lands must, by 8 & 9 Vict. c. 106, be by deed acknowledged, and this appears to be so still, notwithstanding the Married Women's Property Act, 1882, since that statute makes no provision by which a married woman may *disclaim* real property as a *feme sole*.

The disclaimer which you are most likely to be called upon to prepare will be one by a trustee or an executor. You must, in such a case, remember the principle will here apply, that such a person cannot disclaim after he has once done any act indicating an intention to accept the trusteeship or executorship, and for this reason there should be nothing in the deed of disclaimer in any way resembling a conveyance or release of the trust property, for that

would of itself amount to an act of ownership from which an intention to accept the office might be deduced. (*Crewe v. Dickens.*) But it has been held that the acceptance of an executorship will not of itself prevent the executor from disclaiming real estate which has been devised to him upon trusts. (*Wellesley v. Withers.*) Nor can a trustee, when he has once accepted office, get rid of his duties by simply declining to act. His *cestuis que trustent* could require him to act, and he could not free himself from the burden of having to do so except by their consent, or by appointing a new trustee to act in his place. You will remember that the Conveyancing Act, 1881, now provides that, in the absence of a contrary intention in the trust instrument, if there are more than two trustees, one of them may retire without having a new trustee appointed in his place, if by deed he declares his desire to retire, and his co-trustees, and the person, if any, empowered to appoint new trustees, by deed consent to his discharge. You will also remember that the Conveyancing Act, 1882, s. 6, provides that a person to whom a power, whether coupled with an interest or not, is given, may by deed disclaim the power, and that after such disclaimer the power may be exercised by the other person or persons in whom the power was vested. It is doubtful, however, if a power coupled with a duty can be disclaimed even under this section. (See *Re Eyre.*) The effect of a disclaimer by one of several trustees is that the trust estate vests in the other trustees just as if the disclaiming party had never been appointed. (*Adams v. Taunton.*) Should the disclaimer not be executed until after the death of the survivor of the trustees who do accept, the legal estate will vest in the heir of the survivor, or, if he died after 1881, in his personal representatives. (44 & 45 Vict. c. 41, s. 30.) If all the trustees, or a sole trustee, disclaim, the result will be that the property will remain in the person who created the trust.

The deed of disclaimer generally recites the instrument creating the trust, and that the disclaiming party has never accepted or acted in the trusts, and then states that he thereby disclaims and renounces the office of trustee, and all interest and power over the trust property.

As to Renouncements of Executorships by Executors.—An executor may decline to act at all, even if in the lifetime of the testator he

has promised to act. (*Doyle v. Blake.*) And if, when cited, he fails to appear, or dies without having taken out probate, his rights as an executor cease. He can, however, renounce by writing under his hand. A deed is not necessary. But he will not be allowed to renounce in part only. The renunciation must be unconditional; and by sect. 79 of the Probate Act, 1857, when he has once renounced, his rights wholly cease, and the office will go as if he had never been appointed. Prior to the act one of several executors might afterwards have proved in spite of his having previously executed a renunciation, and if an executor who had proved, died leaving another who had renounced surviving, the representation of the testator would not have belonged to the executor of the deceased executor. (*Cottle v. Aldrich.*) And an executor who proves a will cannot renounce the executorship of any person of whom his testator was an executor; for the carrying out of such executorship is part of his duty as executor of his own testator, and renunciation in part is not allowed.

CHAPTER III.

DISENTAILING ASSURANCES.

It may happen that your client is the eldest son of a large landed proprietor upon whom the property has been settled by a strict settlement. Your client will be a tenant in tail of the property, subject to the life estate of his father. He may be about to be married, and may, with the approbation of his father, be desirous of resettling the land in the strict form of settlement for the benefit of his future wife and children. Before he can do this it will be necessary, if he wishes to deal freely with the estate, to execute a disentailing deed barring his estate tail in the land and converting it into an estate in fee simple. Before you can carry your client's wishes into effect, you must turn to the Fines and Recoveries Act, study sects. 1 to 74 thereof, and acquire a knowledge of the conditions under which, as there laid down, an estate tail can be converted into a fee simple one.

You will perhaps say that the Settled Land Act, 1882, gives to a tenant in tail the powers of a tenant for life under that act, and accordingly, *inter alia*, a power to dispose of the fee simple of the land. This act, however, only applies to cases where the estate is in possession, and not to the cases of a tenant in tail in remainder; and moreover, the powers given are only to be exercised for the purposes of the act, and these purposes do not include the conversion of an estate in tail into an estate in fee simple. A disentailing deed, made in accordance with the provisions of the Fines and Recoveries Act, will still be necessary to effectuate your client's intentions, and bar his estate.

You will find by reference to sect. 18 of that act, that tenants in tail, restrained by act of parliament from barring their estates, and tenants in tail after possibility of issue extinct, are specially precluded from exercising the powers conferred by the act. Your

client, you will notice, is not tenant in tail in possession, as his estate is preceded by the life interest of his father. Had it been in possession, he would have been at liberty to bar the entail, so as to defeat the rights thereunder not only of the issue of his body, but also of all persons whose estates were to take effect after the determination of his estate tail, without the concurrence of any other person. But in his case his estate is in reversion, and the owner of the preceding life estate, his father, is, by virtue of the act, the protector of the settlement, and unless he concurs in the disentailing deed, all your client can do is to create a base fee, *i. e.*, an estate in fee simple in which the rights of his issue will be barred, but not those of persons claiming estates by way of remainder or otherwise. That is, he would acquire merely an estate of inheritance so long as he and any of his issue who would have inherited the estate tail, had it not been barred, are alive. Such an estate is not a desirable substitute for a true estate in fee simple. It may, however, be afterwards enlarged into an estate in fee, as where the remainder in fee becomes vested in the owner of the base fee (see s. 39); and also by the tenant in base fee subsequently obtaining the protector's consent and enrolling another deed; and also on the protector's death by enrolling another. The base fee will also be enlarged into a fee simple after the expiration of twelve years from the tenant in base fee becoming entitled in possession, for after this lapse of time the rights of the remaindermen and reversioners are barred by the Statutes of Limitation, 3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57.

The nature of the office of protector, and the provisions as to the giving of his consent, are contained in ss. 22 to 37 of the act. As a rule, the protector is the owner of the first life estate prior to the estate tail, and subsisting under the same settlement, whether such prior estate be encumbered or disposed of or not. This means the beneficial owner, and not a mere owner in trust for others (*Re Dudson*), nor a tenant in dower, nor a bare trustee (s. 27). If the prior estate is owned under the same settlement by two or more persons, each will be sole protector as to his share (s. 23); and where a married woman, if single, would be protector, she and her husband are together the protector, unless the estate is *settled on the woman for her separate use*, when she alone is the protector (s. 24). From the words italicised it must be considered as doubtful whether,

with regard to property which comes to a married woman for her separate use under the Married Women's Property Act, 1882, as the possessor of which she is the protector of a settlement, the husband's concurrence can be dispensed with. Probably it can be, but the question is one which cannot be answered with any degree of certainty until it has come before and been settled by the courts. The protector is not necessarily the owner of the first preceding life estate; for by s. 32 the settlor may, by the settlement creating the entail, appoint any number of persons, not exceeding three, to be protector, and, by means of a power to be inserted in the settlement, perpetuate the protectorship in any number of persons *in esse* whom the donee of the power shall by deed appoint protector in the place of any person dying, or by deed relinquishing his office. But the number of the persons to compose the protector must never exceed three. In these cases the office will pass to the survivors (*Belt v. Holtby*); and if all the protectors die, and the settlement contains no power to perpetuate the protectorship, or, there being such a power, it is not exercised, the tenant for life will thereupon become the protector. (*Clarke v. Chamberlain*.) If the protector be lunatic, the Lord Chancellor, if he be an infant, but having no prior estate, the Chancery Division, will discharge the office; and if the settlor in the settlement declares that the owner of the prior estate shall not be the protector, and does not appoint a protector in his stead, the Chancery Division will be protector during the continuance of such prior estate; and generally the court will be the protector when there is a prior estate but no protector.

The consent of the protector is necessary to enable the tenant in tail to create a larger estate than a base fee, and, also, for the enlargement of a base fee. The protector is subject to no control in the exercise of his power of consenting, and his agreement to withhold his consent is void. When, however, a married woman is protector, and her husband's concurrence is required in giving consent, a judge of the now Queen's Bench Division (formerly of the Common Pleas Court), can, under sect. 91 of 3 & 4 Will. 4, c. 71, dispense with his concurrence in a proper case, *e. g.* while he is abroad or living in separation from his wife. Sects. 42—46 point out the way in which his consent is to be given. It may be given by the disentailing deed or by a distinct deed to be executed at the

same time or previously to the disentailing deed. If it be by a distinct deed, such deed must be enrolled at the same time as or before the disentailing deed. The consent, when once given, is irrevocable; and a married woman may always consent as a *feme sole*, that is to say, that although the husband's concurrence, as already shown, may be required when the consent of his wife, the protector, is given, yet there is no necessity for the wife to acknowledge the deed by which the consent is given.

Disentailment cannot be affected by will or contract. It must in every case be by deed. Formerly, if the tenant in tail was a married woman, the concurrence of her husband was necessary, and the deed had to be acknowledged, even where she was equitable tenant in tail for her separate use. (See *Cooper v. Macdonald*.) But since the Married Women's Property Act, 1882, a married woman can bar the entail without her husband's consent, and without a deed acknowledged, if her marriage took place on or after 1st January, 1883, or even though it took place before that date, provided the estate tail was acquired by her after that date. The Court of Appeal has power, under its lunacy jurisdiction, to bar the estate tail of a lunatic so as to give a good title to a purchaser, but not so as to affect the interests of persons entitled under the limitations of the settlement to the proceeds of the sale. (*Re Pares*.) The disentailing deed is not required by the act to be in any particular form, but in whatever form it may be couched, it must be enrolled in the Central Office of the High Court within six months of execution. The act contains special provisions as to the disentailing of estates tail in copyholds. The general provisions of the act are to apply, except that a legal estate tail is to be barred by surrender, and an equitable estate tail may be barred either by surrender or deed. If the protector's consent is given by deed, it must be executed at the same time as, or before, the surrender, and produced to the steward, who must indorse such production on the deed, and enter the deed with the indorsement on the court rolls. If the consent is not given by deed, it must be given to the person taking the surrender and mentioned in the memorandum of surrender. A deed by which an equitable estate tail is barred must be entered on the rolls of the manor, and, if the protector consents by a separate deed, it must be executed at the same time as, or before, the disentailing deed, and entered on the rolls, and be indorsed with a memorandum of such entry; but

disentailing deeds of copyholds require no enrolment except on the court rolls.

By the 71st section, lands to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and money subject to be invested in a similar purchase, are to be treated as the lands to be purchased. Any assurance under this section of leaseholds or money so circumstanced, must be by assignment by deed enrolled in the Central Office within six months after execution. It has been held that money representing entailed land will not be paid out of court to a tenant in tail capable of disentailing it without the execution of a disentailing deed. (*Re Reynolds*.)

A disentailment is generally carried out by a deed made between the tenant in tail and a grantee to uses, the protector joining (when the estate is not in possession) to give his consent unless it has been given by a separate deed. The tenant in tail conveys the premises to the grantee, to hold them to the grantee and his heirs freed and discharged from the estates tail of the tenant in tail, and all estates, &c. to take effect after or in defeasance of the same, to the use of the tenant in tail in fee simple, where there are prior estates subject to the same. The deed will require a ten shilling stamp; if, however, it operates to vest the property in a purchaser, it must be stamped with an *ad valorem* stamp like an ordinary conveyance.

As we said, a disentailment is generally effected prior to a resettlement of the estate on the marriage of the eldest son of the tenant for life. The estate having been disentailed, the father usually charges his life estate with the payment of an annuity to the son during their joint lives and a jointure for the son's intended wife should the son predecease him, and the son cuts down his interest in tail to a life estate, with a remainder, subject to a jointure for his wife and portions for the youngest children, to his children successively in tail, with remainders to his brothers and their children in tail, with an ultimate remainder in fee to the son. The resettlement will also of course contain the usual powers and clauses contained in settlements as to the management of the estate, trustees, &c., and will be made subject to the charges for pin-money, jointure, and portions created by the former settlement.

We may here mention that the court has no power to rectify a mistake in a deed enrolled under 3 & 4 Will. 4, c. 74. (*Hall Dare v. Hall Dare*.)

CHAPTER IV.

DEEDS OF RELEASE.

You may sometimes be called upon to draw a release by *cestuis que trustent* of their trustees, or by a residuary legatee of the executors. It seems settled that an executor, when all the testator's affairs have been wound up, is entitled to a release from the residuary legatee on handing over the residue to him; but it is not so clear that trustees, when the trusts incumbent on them have all been carried out, are entitled to be released by the *cestuis que trustent*. A trustee, on handing over the trust estate to a *cestui que trust*, is doing so in accordance with the letter of his trust, and that being so, there is no reason why he should have a claim to a release. (See *King v. Mullins*.) But where trust moneys have been re-settled, the trustees of the original settlement are entitled to a release under seal from their *cestuis que trustent*, but not from the trustees of the new settlement. They must be content with a mere receipt from them. (*Re Cater's Trusts*.) The strict law, however, is not always followed in these cases, and often the *cestuis que trustent* will give their trustees a release where they are entitled to decline to do so.

It is not advisable to act for both the parties to a release; for as a rule dealings between trustees and *cestui que trust* should be at arms' length. (See *Rhodes v. Bate*; *Turner v. Collings*; *Kempson v. Ashbee*.) And if a release be obtained without a full disclosure of all the circumstances it may be set aside (*Ramsden v. Hylton*), though until set aside it operates as a bar to all claims. (*Skillbeck v. Hilton*.) Accordingly, full recitals should be inserted in the deed of release, setting out all the circumstances attending the administration of the trust. Bear in mind, too, that where there are recitals, they will control the generality of the operative words, and the

release will only take effect as to the matters set forth in the recitals. (See *Payler v. Homersham*.) If any part of the trust funds is to be retained by the trustees as not being yet payable, there should be a qualifying proviso that the release shall not extend to the funds so retained, and if anything remains to be done by the trustees, a proviso should be added deferring the operation of the release till it is done.

CHAPTER V.

APPOINTMENTS UNDER POWERS.

WE have already offered some few remarks on this subject during the course of the preceding pages, and we now refer you to them. (See *ante*, pp. 4, 6, 80, 148, 170, 272, 333, 427, 428.) It will, perhaps, however, not be without advantage if we supplement those remarks with a few further observations.

We have said that a married woman can exercise a power without the concurrence of her husband, and that acknowledgment under 3 & 4 Will. 4 is not necessary, even if it takes effect out of her own estate. But if a power is given to be exercised while sole, it cannot be executed during coverture. (*Marquis of Antrim v. Duke of Buckingham*.) An infant may exercise a power, if not coupled with an interest. But where an infant had a life estate in *personalty*, followed in default of issue by a general power of appointment, and, in default of appointment, the property was given to such infant absolutely, it was held that it was a pure mandate, and did not deal with any property or interest of the infant, and that he could therefore exercise it during infancy. (*Re D'Angibau*.) But the case would be otherwise if the property were real property.

A power to execute by deed is not at law well executed by a will signed, sealed and duly executed and attested. (*Earl of Darlington v. Pulteney*. And see also *Bushell v. Bushell*.)

The donee of a power, though he be not expressly authorized so to do by the instrument creating the power, may in his appointment reserve a power of revocation and new appointment. (*Adam v. Adam*.) But he cannot on a future appointment dispense with the formalities made necessary by the original instrument; for by the revocation the original power revives. (*Jones v. Lady*

Manchester.) Where the power is exercised by deed, unless a power to revoke be reserved in the deed exercising the power, it cannot be revoked, though there be a power to revoke contained in the instrument creating the power (*Worrall v. Jacob*; see also *Hele v. Bond*); and even though the appointment is made to volunteers. If the power is to be executed upon a contingency, and an appointment be made before the contingency happens, it will in most cases become an effectual execution when the contingency happens. (*Ashford v. Cafe*.) But this will not be so when the contingency is as to the person who is to exercise the power (*Doe d. Calkin v. Tomkinson*); and when it is to be exercised with the consent of any person, such consent must be obtained prior to execution. (*Greenham v. Gibbeson*.)

A point to which you must pay great attention in the exercise of powers of appointment, is to see that you do not offend against the perpetuity rule. This rule, as you know, provides that all limitations by which the vesting of property is postponed for a longer period than that of a life or lives in being, and twenty-one years afterwards (allowing also an additional period for gestation in the case of the appointee being *in ventre sa mère*), are absolutely void. In applying this rule to appointments, you must remember that the appointee claims not under the appointment, but under the instrument creating the power, so that this must be looked to in answering the question whether the exercise of the power is or is not beyond the limits allowed by the rule.

But there is a distinction between general and special powers. A general power leaves the donee free to dispose of the property in any way he may think proper, so that any estates created by him will be deemed to commence not from the creation of the power, but from the time of its exercise. But as to special powers, though the donee may have power to limit the property in fee, he cannot do so as if he himself were the owner in fee. The property is bound up by the instrument creating the power, so that under the appointment he can create no estate which would not have been validly created if limited in the instrument creating the power. And while a special power may embrace objects of any degree of remoteness, and yet not be void merely because attempting to authorize the appointment to persons not necessarily born, or the creation of interests not necessarily within the rule, the

appointment under such powers must be strictly confined to such persons as come within the rule, dating the limit from the instrument creating the power.

We will conclude by giving some miscellaneous points on the exercise of powers in connection with the perpetuity rule. A person who has power to appoint to children absolutely may appoint to a child an estate for life, giving him also a general power of appointment by deed or will (*Bray v. Bree*); or a general power to appoint by will only, if the child is *in esse* at the time of the appointment to him (*Phipson v. Turner*); but not otherwise. (*Wollaston v. King*.) An estate cannot be appointed to an unborn child for life with remainder to his children as purchasers, *i.e.* giving a distinct gift to such children. (*Brundell v. Elces*.) A gift to an object of the power, followed by a gift to a person who is not an object, is void only as to the gift over. (*Brown v. Nisbett*.) A gift to a stranger to the power, followed by a remainder to an object of the power, is good as to the gift of the remainder, and the property will, during the life of the stranger, go as in default of appointment. (*Crozier v. Crozier*.) An appointment to a class of persons, some of whom cannot take as being outside the perpetuity limit, is void altogether. But if the *power* itself only authorizes an appointment among objects which are not too remote, while it is the *appointment* which offends against the rule, it would seem that the appointment will be good as to those persons who may be within the limits of the rule, as it is considered as an appointment to those only who are objects of the power. (See *Lewis, Perpetuities*, 498.) Finally, powers of leasing, sale and exchange, and such other powers usually contained in a settlement, are valid, though there be no express restriction of the exercise of them within the perpetuity rule. (*Lantsburry v. Collier*; *Peters v. East Grinstead Railway Co.*)

PART VII.—CONVEYANCING COSTS.



OUR task would hardly be complete without drawing your attention to the remuneration to which, as a solicitor, you are entitled for conveyancing business; and we propose in this, the concluding part of the book, to deal with this important branch of the subject, the law on which is now regulated by the Solicitors' Remuneration Act, 1881, and the Solicitors' Remuneration Order, 1882. Prior to this act and order coming into operation the principle on which solicitors' bills of costs for conveyancing business were taxed in this country, was the length of the document drawn, and not the importance of the document, nor the skill, labour or responsibility involved in its preparation. The result of such a system you will readily imagine, namely, that documents were drawn at unnecessary length, and made to contain clauses and words which might well be left out, since solicitors, as well as the rest of the community, must pay regard to their pecuniary interests. That such a system, by which an educated and skilled professional man was paid, like a mere copyist, at the rate of so much for every folio of a deed or document he drew, no matter how important or intricate the nature of the matter to which the deed related, or how much skill had to be brought to bear on its preparation, was allowed to continue down to the date of the Solicitors' Remuneration Act and Order coming into operation, *i.e.*, the 1st January, 1883, is indeed remarkable, especially having regard to the great reforms which have taken place in recent years. It is true, that during the present reign certain steps were taken to improve the existing state of things; thus, in 1845, two statutes were passed (8 & 9 Vict. c. 119, and 8 & 9 Vict. c. 124), by which certain short deeds were made sufficient for certain purposes, for

which the solicitor engaged was to be paid by the skill and labour employed, and the responsibility incurred. These two statutes proved, however, practically dead letters. The next legislative enactment on the subject took place in 1870. The Solicitors Act of that year, besides allowing a solicitor to contract with his client for *future* costs (a right which did not previously exist), enabled the taxing master to take into consideration, when taxing a solicitor's bill, not only the length of the document, but also the skill, labour, and responsibility involved. This salutary amendment had, however, but little real effect, and the old system of charging by length of documents drawn, copied, &c., and by the number of attendances made on the client, continued, to the trouble and dissatisfaction of lawyers, and probably also to their clients, who must necessarily have found great difficulty in understanding the effect of deeds containing a mass of unnecessary verbiage. Now one of the main objects of the Conveyancing Act, 1881, was, as you know, to shorten and simplify all kinds of conveyances; but the provisions of that important and useful statute being in this particular matter of an optional nature, would undoubtedly have proved inoperative had not some scheme been arranged by which solicitors who adopted the statute, and prepared under its provisions concise and intelligible deeds, should be entitled on taxation to as high a remuneration as solicitors of the conservative and old school type, who, ignoring the beneficial effects of the new act, continued to prepare their deeds at their former unnecessary and absurd length. The scheme was carried out by the Solicitors' Remuneration Act, 1881, by which provision was made for the drawing up by the persons therein enumerated of a scale or scales to regulate the remuneration of a solicitor in conveyancing business. The statute, with the idea no doubt of inducing solicitors to accept and act on the Conveyancing Act, gave wide powers to the persons appointed to draw up the order as to mode and amount of remuneration to be fixed by the scale or scales to be drawn up.

The order was issued in 1882, and was under the hands of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the President of the Liverpool Law Society (it is noticeable that the President of the Incorporated Law Society did not append his signature to the order), and consists of twelve clauses,

followed by two schedules. The first schedule is divided into two parts. Part I. contains a scale of charges to be allowed to a solicitor on sales, purchases and mortgages, whether he is acting for vendor, purchaser, mortgagor or mortgagee. The scale here is based on the amount of the purchase or mortgage money. The scale is followed by twelve rules made to meet special circumstances.

Part II. of the first schedule contains two scales of charges, one for leases at rack rent (except mining leases and building leases), and the other for building leases and leases not at rack rent (except mining leases), and for conveyances for a freehold estate subject to a rent. The remuneration here is based on the amount of the rent. This part of the schedule is followed by six rules intended to meet special cases.

The second schedule regulates the remuneration for preparing, &c. wills, settlements, mining leases and other documents not coming within the first schedule, or with regard to which, although within the first schedule, the solicitor has, as he is empowered to do by the order, elected, before undertaking the business, to be paid for by the scale given in this second schedule. The remuneration allowed by this second schedule is based on the old system of charging, namely, the length of the document, the sheets of abstract, the number of the attendances, &c. In fact, the charges for the class of work falling within this schedule are to be the same as those now existing, except as altered in the schedule.

By the schedule a more liberal scale than that formerly recognized is allowed in certain cases; thus, 10*s.* instead of 6*s.* 8*d.* is the charge for each attendance; 2*s.* per folio for drawing instead of 1*s.*, and the taxing master is empowered to increase or *diminish* the charges in special cases. The second schedule also regulates the remuneration for all business to which Schedule I. relates if the matter falls through and is not completed.

The order came into operation on the 1st January, 1883, and, as you will gather from the above brief outline, solicitors are now, for most conveyancing business, paid for their services on a proper principle, namely, according to the importance of the transaction and the consequent degree of responsibility involved, unless they choose to resort to the old plan, by giving notice to their client of their intention to be remunerated by the present system as altered by the scale of Schedule II. Before proceeding to give details of

the order, we would draw your attention to the fact that a solicitor may, under the express provisions of sect. 8 of the Remuneration Act, either before, after, or in the course of the transaction of any business, enter into a written agreement with his client (signed by the party to be bound thereby), whereby he may be remunerated by a gross sum, commission or percentage, or a salary or otherwise, and the effect of this agreement will be to prevent the remuneration allowed by the order being applicable, but in other cases the order applies and regulates the remuneration for all kinds of conveyancing business. Without discussing the question whether the scales of remuneration are sufficiently liberal, we will proceed to consider the order in detail, and, to the better enable you to understand the effect of the order, we will divide our subject into four divisions or heads:

- I. The scale of charges for sales, purchases and mortgages (the transactions being completed), and the rules relating thereto, being Part I. of Schedule I. of the Order.
 - II. The scale of charges for leases or conveyances at a rent or agreement for the same, other than mining leases and agreements therefor (the transactions being completed), and the rules relating thereto, being Part II. of Schedule I. of the Order.
 - III. The scale of charges for taking instructions, drawing and perusing wills, settlements, mining leases and other documents, not set out above, and for all transactions which are not completed, whether set out above or not, being matters included in Schedule II. of the Order.
 - IV. Some miscellaneous provisions.
 - V. Some important decisions on the act and order.
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- I. The Scale of Charges for Sales, Purchases and Mortgages (the transaction being completed), and the Rules relating thereto, being Part I. of Schedule I. of the Order.

We extract the following from the order itself, deeming it advisable to set out the scale and rules *in extenso*, the headings to

the rules being, however, our own, and added merely for convenience.

SCALE.

	1. For the 1st 1,000 <i>l</i> .	2. For the 2nd and 3rd 1,000 <i>l</i> .	3. For the 4th and each sub- sequent 1,000 <i>l</i> . up to 10,000 <i>l</i> .	4. For each sub- sequent 1,000 <i>l</i> . up to 100,000 <i>l</i> . *
	Per 100 <i>l</i> .	Per 100 <i>l</i> .	Per 100 <i>l</i> .	Per 100 <i>l</i> .
Vendor's solicitor for negotiating a sale of property by private contract	20 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> .
Vendor's solicitor for conducting a sale of property by public auction, including the conditions of sale—				
When the property is sold	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> .	2 <i>s</i> . 6 <i>d</i> .
When the property is not sold, then on the reserved price	10 <i>s</i> .	5 <i>s</i> .	2 <i>s</i> . 6 <i>d</i> .	1 <i>s</i> . 3 <i>d</i> .
[N.B.—A minimum charge of 5 <i>l</i> . to be made whether a sale is effected or not.]				
Vendor's solicitor for deducing title to freehold, copyhold or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)	30 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> .
Purchaser's solicitor for negotiating a purchase of property by private contract	20 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> .
Purchaser's solicitor for investigating title to freehold, copyhold or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)	30 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> .
Mortgagor's solicitor for deducing title to freehold, copyhold or leasehold property, perusing mortgage and completing	30 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> .
Mortgagee's solicitor for negotiating loan ..	20 <i>s</i> .	20 <i>s</i> .	5 <i>s</i> .	2 <i>s</i> . 6 <i>d</i> .
Mortgagee's solicitor for investigating title to freehold, copyhold or leasehold property, and preparing and completing mortgage..	30 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> .
Vendor's or mortgagor's solicitor for procuring execution and acknowledgment of deed by a married woman	2 <i>l</i> . 10 <i>s</i> . extra.			

* Every transaction exceeding 100,000*l*. to be charged for as if it were for 100,000*l*.

RULES.

Sales in Separate Lots.

1. The commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys

several such lots and takes one conveyance, and only one abstract is delivered, the commission is to be chargeable upon the aggregate prices of the lots.

Attempted Sales—Sale after previous abortive Auctions.

2. The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of the reserved prices. When property offered for sale by auction is bought in and terms of sale are afterwards negotiated and arranged by the solicitor, he is to be entitled to charge commission according to the above scales on the reserved price where the property is not sold, and also one-half of the commission for negotiating the sale. When property is bought in and afterwards offered by auction by the same solicitor, he is only to be entitled to the scale for the first attempted sale, and for each subsequent sale ineffectually attempted he is to charge according to the present system as altered by Schedule II. hereto. In case of a subsequent effectual sale by auction, the full commission for an effectual sale is to be chargeable in addition, less one-half of the commission previously allowed on the first attempted sale. The provisions of this rule as to commission on sales or attempted sales by auction are subject to the provisions of the order.

(See *Re Beck* and *Re Inderwick*, *post*, p. 511.)

Solicitor acting for both Mortgagor and Mortgagee.

3. Where a solicitor is concerned for both mortgagor and mortgagee, he is to be entitled to charge the mortgagee's solicitor's charges and one-half of those which would be allowed to the mortgagor's solicitor up to 5,000*l.*, and on any excess above 5,000*l.*, one-fourth thereof.

Perusal of Drafts for several Persons.

4. If a solicitor peruses a draft on behalf of several parties having distinct interests, proper to be separately represented, he is to be entitled to charge 2*l.* additional for each such party after the first.

Solicitor acting for Person joining in Conveyance, &c.

5. Where a party, other than the vendor or mortgagor, joins in a conveyance or mortgage, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by Schedule II. hereto.

Conveyance and Mortgage prepared by same Solicitor.

6. Where a conveyance and mortgage of the same property are completed at the same time, and are prepared by the same solicitor, he is to be entitled to charge only half the above fees for investigating title, and preparing the mortgage deed up to 5,000*l.*, and, on any excess above 5,000*l.*, one-fourth thereof, in addition to his full charges upon the purchase-money and his commissions for negotiating (if any).

*How fractions of 100*l.* to be charged.*

7. Fractions of 100*l.*, under 50*l.*, are to be reckoned as 50*l.* Fractions of 100*l.*, above 50*l.*, are to be reckoned as 100*l.*

Remuneration in small Cases.

8. Where the prescribed remuneration would, but for this provision, amount to less than 5*l.*, the prescribed remuneration shall be 5*l.*, except on transactions under 100*l.*, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor, or mortgagee, is to be 3*l.*

Sale subject to Incumbrances.

9. Where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption.

Transfers of Mortgages—Further Charges.

10. The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or on any previous transfer; and it is not to apply to further charges where the title has been so previously investigated. As to such transfers and further charges the remuneration is to be regulated according to the old system as altered by Schedule II. hereto. But the scale for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable.

Commission for conducting Sales, &c.

11. The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. The scale for negotiating shall apply to cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price, and the terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate or other agent. As to a mortgagee's solicitor it shall only apply to cases where he arranges and obtains the loan from a person for whom he acts. In case of sales under the Lands Clauses Consolidation Act, or any other private or public act under which the vendor's charges are paid by the purchaser, the scale shall not apply.

(See *Re Beck*, *post*, p. 511; *Re Wilson*, *post*, p. 512; and *Re The Merchant Taylors' Company*, *post*, p. 513.)

Charges allowed where no Commission charged for negotiating Sales, &c.

12. In cases where, under the previous portion of this schedule, a solicitor would be entitled to charge a commission for negotiating a sale or mortgage, or for conducting a sale by auction, and he shall not charge such commission, then he shall be entitled to charge the rates allowed by the first column on all transactions up to 2,000*l.*, and to charge in addition those allowed by the second column on all amounts above 2,000*l.* and not exceeding 5,000*l.*, and further to charge those allowed by the third column on all amounts above 5,000*l.* and not exceeding 50,000*l.*, instead of the rates allowed up to the amounts mentioned in those columns respectively.

II. The Scale of Charges for Leases or Conveyances at a Rent and Agreements for the same, other than Mining Leases and Agreements therefor (the transactions being completed), and the Rules relating thereto, being Part II. of Schedule I. of the Order.

There are two scales for this class of business given, one relating to leases at rack rent, and the other to building leases and conveyances of a freehold estate reserving a rent. Mining leases are excepted and brought within Schedule II., but all agreements for leases, not being mining leases, and conveyances at a rent are regulated by the scales, as will be seen from the following, which we extract from the order :

(a) Scale of Charges for leases, agreements for leases at rack rent (other than mining leases or leases for building purposes, or agreements for the same).

Lessor's solicitor for preparing, settling, and completing lease and counterpart :—

Where the rent does not exceed 100*l.* { 7*l.* 10*s.* per cent. on the rental, but not less in any case than 5*l.*

Where the rent exceeds 100*l.* and does not exceed 500*l.* { 7*l.* 10*s.* in respect of the first 100*l.* of rent, and 2*l.* 10*s.* in respect of each subsequent 100*l.* of rent.

Where the rent exceeds 500*l.* { 7*l.* 10*s.* in respect of the first 100*l.* of rent, 2*l.* 10*s.* in respect of each 100*l.* of rent up to 500*l.*, and 1*l.* in respect of every subsequent 100*l.*

Lessee's solicitor for perusing draft and completing { One-half of the amount payable to the lessor's solicitor.

(b) Charges as to conveyances in fee or for any freehold estate, or building leases, reserving rent, or other long leases not at rack rent (except mining leases), and agreements for the same respectively :—

Vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart :—

Amount of Annual Rent.	Amount of Remuneration.
Where it does not exceed . 5 <i>l.</i>	5 <i>l.</i>
Where it exceeds 5 <i>l.</i> and does not exceed } 50 <i>l.</i>	{ The same payment as on a rent of 5 <i>l.</i> , and also 20 per cent. on the excess beyond 5 <i>l.</i>
Where it exceeds 50 <i>l.</i> but does not exceed } 150 <i>l.</i>	{ The same payment as on a rent of 50 <i>l.</i> , and 10 per cent. on the excess beyond 50 <i>l.</i>
Where it exceeds 150 <i>l.</i>	{ The same payment as on a rent of 150 <i>l.</i> , and 5 per cent. on the excess beyond 150 <i>l.</i>

Where a varying rent is payable, the amount of annual rent is to mean the largest amount of annual rent.

Purchaser's or lessee's solicitor for perusing draft and com- pleting	}	One-half of the amount payable to the vendor's or lessor's solicitor.
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RULES.

Charges for Abstract of Title.

1. Where the vendor or lessor furnishes an abstract of title, it is to be charged for according to the old system as altered by Schedule II.

Solicitor engaged for both Parties.

2. Where a solicitor is concerned for both vendor and purchaser, or lessor and lessee, he is to charge the vendor's or lessor's solicitor's charges, and one-half of that of the purchaser's or lessee's solicitor.

Mortgagor or Mortgagee joining in Conveyance, &c.

3. Where a mortgagee or mortgagor joins in a conveyance or lease the vendor's or lessor's solicitor is to charge 1*l.* 1*s.* extra.

A third Person joining in Conveyance, &c.

4. Where a party other than a vendor or lessor joins in a conveyance or lease, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by Schedule II.

Consideration consisting partly of Rent and partly of Payment down.

5. Where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium.

*Fractions of 5*l.**

6. Fractions of 5*l.* are to be reckoned as 5*l.*

III. The Scale of Charges for taking Instructions for Drawing and Perusing Wills, Settlements, and other Documents not set out above, and for all Transactions which are not completed, whether set out above or not, being matters included in Schedule II. of the Order.

The remuneration for this business is according to the old system as altered by the second schedule. We have already explained the principle of remuneration as it formerly existed, and we need not further dilate upon it. You will bear in mind,

that, in addition to the above matters, the scale and terms of Schedule II., which we set out below, apply also to cases within rule 5 of Part I. of Schedule I., and to cases within rules 1 and 4 of Part II. of the same schedule (*vide supra*). The following is a copy of Schedule II.:—

INSTRUCTIONS FOR AND DRAWING AND PERUSING DEEDS, WILLS,
AND OTHER DOCUMENTS.

Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable. In ordinary cases, as to drawing, &c., the allowance shall be—

For drawing	2s. per folio.
For engrossing	8d. " "
For fair copying	4d. " "
For perusing	1s. " "

ATTENDANCES. s. d.

In ordinary cases	10	0
In extraordinary cases the taxing master may increase or diminish the above charge if for any special reasons he shall think fit.		

ABSTRACTS OF TITLE (WHERE NOT COVERED BY THE ABOVE SCALE).

	s. d.
Drawing each brief sheet of 8 folios	6 8
Fair copy	3 4
(See <i>Re Lacey, Re Field, and Fleming v. Hardcastle, post</i> , pp. 511—512.)	

JOURNEYS FROM HOME.

In ordinary cases for every day of not less than seven hours	£	s.
employed on business or in travelling	5	5
Where a less time than seven hours is so employed. . per hour	0	15
In extraordinary cases the taxing master may increase or diminish the above allowance if for any special reasons he shall think fit.		

IV. Some Miscellaneous Provisions.

(1) The order laying down the above scales of remuneration is to take effect from and after the 31st December, 1882.

(See *Re Lacey, Re Field, and Fleming v. Hardcastle, post*, pp. 511—512.)

(2) The scales given in Heads I. and II. do not apply to transactions respecting real property the title to which has been registered under 25 & 26 Vict. c. 53; 25 & 26 Vict. c. 67; and 38 & 39 Vict. c. 87.

(3) The scales given in Heads I. and II. above do not apply unless the business is completed, so that if a contemplated purchase, or mortgage, or lease, falls through before completion, the solicitor will not be paid by a scale reckoned on the amount of the purchase, or mortgage, or rent, but by the length of the documents he has drawn, &c., the number of attendances made, according to the old system as altered by scale of charges given in Head III. above.

(4) Drafts and copies made in the course of any conveyancing business are to be the property of the client.

(5) The scales given for the class of business treated of under Heads I. and II. above do not include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid on searches to public offices, or registration, or to stewards of manors, costs of extracts from any register, record or roll, or other disbursements reasonably and properly paid, *nor any extra work occasioned by changes occurring in the course of any business, such as death or insolvency of a party to the transaction, nor is it to include any business of a contentious character, nor any proceedings in any court*; but they do include law stationer's charges, and allowances for time of the solicitor and his clerks, and for copying, and parchment, and all other similar disbursements.

(See *Stamford v. Roberts*, *post*, p. 511; and *Fleming v. Hardcastle*, *post*, p. 512.)

(6) In respect of any business which is *required to be and is* by special exertion carried through in an exceptionally short space of time, a solicitor may be allowed a proper additional remuneration for the special exertion.

(7) As we have already pointed out, a solicitor may, in any case, prevent the scales prescribed in Schedule I. of the Order—*i.e.* for the classes of business set out in Heads I. and II. above—applying, by communicating in writing to his client *before undertaking the business* his election to be paid by the old system of remuneration as altered by Schedule II. of the Order. (See Head III. above.)

(8) Security for the amount of costs to become due to the solicitor for business to be transacted by him may be given by the client, and accepted by the solicitor, and security may also be given for interest on such amount, provided that the interest does

not commence till the amount due is ascertained by agreement or taxation.

(9) Interest may be charged by a solicitor at four per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demanding payment from the client. The demand to be made, in cases where the payment is to be made by an infant or out of a fund not presently available, on the parent or guardian, or the trustee, or other person liable.

V. Some important Decisions on the Remuneration Act and Order.

Re Beck, In re Hartington's Estate.—Decided that a vendor's solicitor is entitled to commission for conducting the sale, and a proper sum for auctioneer's charges, where the property was offered by public auction and afterwards sold by private contract.

Re Lacey.—The Court of Appeal decided two points, viz. (1) that the Remuneration Order applied to a conveyancing transaction which was commenced before, but concluded after, 31st December, 1882; (2) that the scale charge could only be made where the work mentioned in the scale has been in substance done. Consequently, in this case it was held that where the purchaser dispenses with an investigation of the title and the title is not deduced, the remuneration must be according to Schedule II., and not according to the scale allowed in Part I. of Schedule I.

In re Inderwick.—A vendor's solicitor is entitled to a fee for conducting a sale by private contract effected on the same day as the property was offered, though abortively, by public auction. The auctioneer's charge of the quarter per cent. on the purchase-money was also held to be in such a case payable out of the contract price.

Stamford v. Roberts.—Notwithstanding the language of the Solicitors' Remuneration Act, 1881, and of the Remuneration Order, Kay, J., held that the scale charge allowed for conveyancing business applied to conveyancing work done by a solicitor in connection with an action in the Chancery Division. This rule was quite recently adopted by the Court of Appeal in *Fleming v. Hardcastle*, *infra*.

In re Weddall, Parker v. Parker.—A solicitor is entitled under rule 11 (*ante*, p. 506), to charge a “negotiating fee” where the mortgagee has been introduced to the mortgagor by another person. In this case one A., solicitor for the mortgagor, wrote to B. asking him if he knew of any one ready to advance 2,000*l.* on mortgage. B. wrote to C., his mother-in-law, and stated that he had gone into the proposed security. C. wrote to Messrs. Weddall asking for their advice. Messrs. Weddall investigated the matter, had the property valued, and ultimately, the inquiries being to their satisfaction, C. advanced the money. Pearson, J., held that Messrs. Weddall were entitled to the negotiation fee.

Re Field.—The Court of Appeal decided that a solicitor could not, in addition to the scale charge for a lease, claim separate remuneration for interviews and attendances, including journeys, which resulted in the agreement for the lease, and led to the heads of the terms upon which the lease was prepared. In this case, also, the principle laid down in *Re Lacey* (*supra*), that the Remuneration Order applied to a transaction, the negotiations for which took place before, but which was not completed until after, 31st December, 1882, was followed.

Re Wilson.—The Court of Appeal decided that if a solicitor employs a surveyor, to whom the taxing master allows remuneration for preparing plans, dividing the property into lots, &c., he (the solicitor) is not entitled to the scale for conducting the sale of the property, for in such a case the surveyor has done, and been paid for, much of what properly constitutes the conduct of a sale. Whether the employment of an auctioneer merely to conduct the sale in the auction room was sufficient to deprive the solicitor of the “conducting fee,” was, the Court said, a question more difficult to answer, looking to the words of the order, which provides that the remuneration prescribed by Schedule I. is not to include auctioneer’s or valuer’s charges. The point was not decided by the court, and so still remains an open one.

In *Fleming v. Hardcastle* the Court of Appeal laid down four points: (1) The act and order apply to business commenced but not completed till after 31st December, 1882. This had been already decided in *Re Lacey* and *Re Field* (*supra*). (2) The act and order

apply to conveyancing business in connection with an action in the Chancery Division. This follows *Stamford v. Roberts*. (3) The scale fee applies even though the title to the whole of the property had not been thoroughly investigated, provided the investigation had proceeded as far as necessary. (Compare *Re Lacey, supra*.) (4) In a case where the purchaser's solicitor prepares the contract for sale, he is entitled to charge for it under Schedule II., in addition to charging the usual scale fee for investigating the title, &c., because the scale fee in favour of the *purchaser's* solicitor does not include the preparation of the contract.

In *Re Merchant Taylors' Company*, Chitty, J., decided that rule 11 of Schedule I., Part I. of the Order applies so as to entitle a solicitor to charge the scale fee on a re-investment in land of money paid into court under the Lands Clauses Consolidation Act.

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